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Yale Law School Centennial

THERE was a celebration of the Centennial of the School of Law of Yale University on June 16. The exercises were held in Sprague Memorial Hall, Dean Swan presiding. The speakers on the program were James Rowland Angell, President of the University; Harlan Fiske Stone, Attorney General of the United States, and William Howard Taft, Chief Justice of the U. S. Supreme Court. In his address, which was on "Some Phases of American Legal Education," Attorney General Stone thus spoke of the early law schools in America:

"The first American institution which could be fairly described as a school for the training of lawyers, was the private enterprise of Judge Tappan Reeves, who established his school at Litchfield, Connecticut, in 1784. This, and numerous other similar enterprises which thrived during the first years of the nineteenth century, marked the transition from the stage of apprenticeship, to the beginnings of university law study.

"Harvard took the first step toward the founding of a school of law in 1817, a step, however, which was not effective in a real sense, until Judge Story was called to the Dane professorship of law in that institution in 1830. In the meantime, in 1824, Yale College took over, as a department of the college, the private law school conducted by Seth. P. Staples in New Haven. Thus began the long and honorable career of the Yale School of Law, the first century of whose existence and public service comes to a close during the present year.

"That service has been marked by an elevated sense of duty to the profession, by a steadfast maintenance and steady improvement of its standards and an active participation and capable leadership in the movement which, in our own day, is making our leading law schools in the United States, in the truest and best sense, university schools of law."

History of the American Bar Association

PLANS are being made for the collection of material for a History of the American Bar Association, to be issued in commemoration of the fiftieth anniversary of the founding of the organization. For the purpose of securing material from original sources the following letter is being sent out by President Saner to members of the Association who are able to supply information as to its "early days and later development and growth:"

June 2, 1924.

"My dear Sir: We are desirous that the Philadelphia meeting of the American Bar Association, to be held on July 8th, 9th and 10th, shall be a notable occasion, and trust it will be convenient for you to attend. A seat upon the stage will be held for you.

"Within the space of the next two or three years we shall have arrived at our Fiftieth Anniversary, and as promptly as possible, it is our desire to collect sufficient data to publish a comprehensive history of the American Bar Association. We should, therefore, begin at once to collect material from those who are able to tell us of the early days and later development and growth of our great organization. To that end, will you be good enough to prepare and send to Honorable Frederick E. Wadhams, 78 Chapel St., Albany, New York, data as indicated below.

"(a) Your remembrance of the meeting at which the American Bar Association was organized and incidents, personal or otherwise, of this meeting.

"(b) Sketches of outstanding figures in the American Bar Association from its beginning and comment upon important measures proposed and debated in the various sessions you have attended.

"(c) Personal reminiscences—stories, jokes, etc.

"(d) We would like to secure your photograph made at the time you joined the Association, or since,

and the photographs of any other prominent men in the Association.

"(e) Won't you suggest the names of other persons who can supply similar data and material for the preparation of this work?

"Mr. Wadhams has agreed to receive and arrange this material so that it can be turned over to Honorable Hampton L. Carson, of Philadelphia, whose health we trust will permit him to prepare the volume.

"Hoping to receive your hearty support, and assuring you of our appreciation of your helpfulness in making this an accomplished fact on our Fiftieth Birthday, and trusting I may have the pleasure of seeing you at Philadelphia, I am, with sincere good wishes,

"Very truly yours,
"R. E. L. SANER"

Status of Bar Association Bills

THE following statement by Judge Everett P. Wheeler, chairman of the Association's committee in Jurisprudence and Law Reform, will be of interest to members who are following the progress of the various American Bar Association Bills in Congress:

"Now that Congress has adjourned it is in order to report to the Bar what has been done with the Bills for the Improvement of Legal Procedure which the Association recommended. They are mentioned in the Report, which is being distributed to members, but I can now bring the history up to date.

"No. 1: The bill substituting *Remedy by Appeal* for the Writ of Error has passed the Senate and been reported favorably in the House.

"No. 2: The bill for *appointing official stenographers* and *regulating their fees* has been reported favorably in the Senate as an amendment to the bill providing for Court Reporters. In our Report for 1909 we recommended the passage of this bill, but although the bill has been repeatedly approved by the Association and several times has been presented to Congressional Committees, the Stenographers' Union has been sufficiently powerful to prevent it ever coming to a vote. What a comment it is on our rules of legislation and on the attitude of Congress on Law Reform that a bill so manifestly just should have been so long deferred! I am told that one of the firms of Court Stenographers in the Federal Courts makes $75,000 a year. On the other hand, I hear from Arizona the sad story that litigants are too poor to pay the expenses of a stenographer. No doubt this happens in other States. I know from my own long experience in the Federal Courts that the fees charged by unofficial stenographers are very high and burdensome. They are not regulated by law. We all are familiar with Mr. Lincoln's famous statement as to what this Government was. It seems to me sometimes it might be more truly described as a Government by Trades Unions and for Trade Unions. They are exempt from taxation and have many other privileges not granted to ordinary citizens. We have no voice in the selection of their officers, yet they govern us.

"It is within my recollection that the clerks in the Federal Courts and the marshals were paid by fees. At one time the fees of the clerk of the United States District Court of the Southern District of New York amounted in one year to over $30,000, which was more than the salary of the President of the United States at that time. This system has now been abolished,—clerks and marshals are paid salaries, but the stenographers in the Federal Courts still keep their grip.

"No. 3: The bill giving to the Federal Courts power to render *Declaratory Judgments* has not been reported. This bill would enable the rights of parties in an actual controversy to be determined in advance of actual breach and consequent litigation. A similar bill has been recommended by the Commissioners on Uniform State Laws and has been enacted in New York, New Jersey, Colorado, Florida, Connecticut, Tennessee, and Kentucky. Similar Legislation has been in force in England with the result of diminishing litigation, preventing delay, and lessening expense.

"No. 4: The bill giving Federal Courts the power to punish violation of the treaty rights of aliens. This power has not been conferred upon them. The consequence is that foreign powers can justly complain of the violation of the treaty rights of their nationals, which this Government has guaranteed but which it is powerless to redress. This bill has not been reported.

"No. 5: Another bill recommended by the Association would remove the deprivation of civil rights which under the existing system follows in many States the conviction in Federal Courts for trifling statutory offenses. This bill also has not been reported on.

"The Association has done its part. When people complain of defects in the law they should censure Congress and not the lawyers.

"EVERETT P. WHEELER"

June 11, 1924.

THE COMMON LAW AND THE IDEA OF PROGRESS

Philosophy of Progress Has Been So All-Pervading in General Thinking of the Time that It Has Affected Attitude and Reasoning of Courts and Brought About Profound and Far-reaching Transformations in the Entire Legal Order*

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1. Prevalence of the Idea of Progress

RENAN, writing many years ago, described the intellectual advance of the past century as consisting in "the substitution of the category of Becoming for Being, of the conception of relativity for that of the absolute, of movement for immobility."[1] Another French writer wrote in 1850, "if there is any idea that belongs properly to one century, at least by the importance accorded to it, and that, whether accepted or not, is familiar to all minds, it is the idea of Progress conceived as the general law of history and the future of humanity."[2]

The twentieth century has inherited the philosophic outlook of the nineteenth, for the ruling conception of the present in all fields of thought is the Idea of Progress,—the dogma that the human race has yet to realize a more perfect existence, involving, on the one hand, increased domination over and use of physical environment, and, on the other hand, a more equable distribution of wealth and economic opportunity, with a consequent amelioration of social conditions, and a lessening of friction in the struggle for existence.[3] Past ages believed that the racial ideal had been obtained by prior generations in a Utopia long-since passed away, and that the effort must be to restore that which had been once enjoyed; the present era, on the contrary, looks toward the future, to an ideal never yet attained in human history.[4] Two recent thinkers, writing in different fields, bear witness to the prevalence of the Idea of Progress. Professor Bury of Cambridge tells us that,

> The idea of human progress . . . is a theory which involves a synthesis of the past and a prophecy of the future. It is based on an interpretation of history which regards men as slowly advancing—*pedetemtim progredientes*—in a definite and desirable direction, and infers that this progress will continue indefinitely.[5]

And Doctor Fosdick, of Union Theological Seminary, declares that,

> The modern man, living in a world supposedly progressing from early crude conditions toward perfection, has shifted the golden age from the past to the future, and in so doing has placed himself in much closer proximity to it than his ancestors were. . . . Like a changed climate, which in time alters the fauna and flora of a continent beyond the power of human conservatism to resist, this progressive conception of life is affecting every thought and purpose of man, and no attempted segregation of religion from its influence is likely to succeed.[6]

Combined with this dominant philosophy of the present, is the further belief that through mastery of physical and social forces human society itself can be directed and controlled in order to realize the goal of a more perfect existence. Striking illustration of this dominant type of thought is to be seen in the efforts being made by some criminologists and penologists to prevent crime by destroying, or otherwise confining, the sources of the impure and diseased blood stream—the large cause of crime—and thus prohibiting its flow into the channels of posterity.[7] The past, and many of our present laws, dealt with the criminal offender on the basis that he was a normal person who knew the right, yet preferred to pursue the wrong; and while much crime is thus committed, increasing knowledge has shown us that an equally large per cent, if not larger, is due to inherited disease, or abnormality and arrested development.

This Idea of Progress is playing a role similar to that played by other ruling ideas in times past with respect to the creative activity of mankind, including the legal order. In European civilization for the past two thousand years, there are traceable various social minds, or group thinking and group practises, which have had their effects upon the intellectual heritage of succeeding generations, and which has in turn been restated to conform to the different needs and conditions occasioned by an advancing civilization.[8] Our present social mind may be characterized as one wherein two dominant conceptions prevail, namely, Science and Democracy; the object of the first being to improve the physical condition of men, that of the second, to improve their social and governmental welfare. The Idea of Progress is the philosophy or means by which both are sought to be realized.

So far as the legal order itself is concerned, it is not difficult to trace the effect of outstanding conceptions upon legal doctrines and institutions. In the days of the *jus naturale*, the appeal to a body of ideal legal principles, supposedly based upon human reason common to all men and partially realized in the *jus gentium*,

*Revision of a paper read at the annual meeting of the American Historical Association, December, 1923, Columbus, Ohio.

1. Averroes et l'Averroisme, p. vii.

2. M. A. Javary, De l'idee du progres, 8.

3. It should be borne in mind by the reader that the object of the writer of this article is to describe what he believes is an important tendency in thought today, and not to set forth this tendency as, in all respects, his own viewpoint.

4. In countries where Christianity has been dominant, or where the Bible has been the accepted authority in religious matters, it has been said that recent critical thought in restricting the Bible to matters of faith instead of practise and belief on all subjects, has been an efficient cause toward a more progressive conception of life in general. See Andrew D. White, A History of the Warfare between Science and Theology in Christendom, vol. I, p. 97.

5. The Idea of Progress, p. 5.

6. Christianity and Progress, pp. 187-188, 12; see also Troeltsch, Protestantism and Progress, p. 9-10, for the significant developments in thinking since the close of the Middle Ages.

7. Particular reference is made to the psychopathic clinics connected with certain courts in Chicago, Detroit, Boston, and Philadelphia. See "The Psychopathic Clinic in a Criminal Court," Dr. A. L. Jacoby, 7 Amer. Jud. Socy. Journ., 21; also "Crime and Heredity," by Chief Justice Harry L. Olson, 7 Amer. Jud. Socy. Journ., 37.

8. So far as theology is concerned, Dean Mathews of Chicago University has demonstrated this beyond question. See "Theology from the Point of View of Social Psychology," 3 Journal of Religion, 337. This viewpoint in theology is similar to Dean Pound's view in juristic thinking as set forth in "The End of Law as Developed in Juristic Thought," 30 Harvard L. Rev. 211, and in his various books.

profoundly modified the inherited *jus civile* or common law of the Roman Empire. So also the appeal to reason against authority in the closing days of the Middle Ages served to undermine, gradually but surely, the temporal authority of the pope and the statutory authority of Justinian's laws. The jurists of the Natural Law of the eighteenth century and the individualists of the nineteenth, must likewise be credited with having wrought modifications in the law as it had been received. There were, of course, then as now, external forces besides the ideational factors which made for change, but the dominant expression, as is always the case in any historical movement, was in terms of philosophy, which gives a movement direction and significance.

The program of all these efforts, so far as juristic thinking was concerned, was, however, from the present viewpoint of progress, inadequate, in that there was lacking the consciousness that society not only could, but must be reconstructed;[9] the efforts of the past were either largely destructive, a removal of archaisms and irrational legal doctrines, or justification of a legal system or a body of ideal legal principles stated in terms of past racial experience. The idea of progress had not yet been born, nor were the conditions present to give it birth.

2. Emergence of the Idea of Progress.

It must not be forgotten that the viewpoint that the race is progressing and evolving toward a better earthly existence, is a comparatively recent conception. In the words of Mr. Justice Holmes:

> Within the past hundred or fifty years it has become popular to believe that society advantageously may take its destiny into its own hands—may give a conscious direction to much that heretofore has rested on the assumption that the familiar is the best, or that has been left to the mechanically determined outcome of the cooperation and clash of private effort.[10]

Briefly, no less than five prominent factors have combined to create this present dogma of the Idea of Progress. These factors have appeared successively and not simultaneously in the course of history, but have in our day united to bring about this dominant progressive conception of life and human destiny. The outstanding factor may be said to be the one of expanding knowledge in all fields of learning, but particularly in the exact sciences, where demonstration and proof have been in the main possible. No definite date can be set for the beginning of this increase in knowledge, but undoubtedly the dethronement of the geocentric conception in astronomy gave great impetus to it; for with the helio-centric theory well established, it came to be widely held that the ancients were not as wise as had been generally believed. Having overthrown so successfully this ancient conception of the universe, the thinkers of the Renaissance soon attacked other inherited beliefs; and ever since the movement has been going on unchecked—the old is given little credence, the new has unusual prestige; the future has mysteries which will yet be solved to serve the purposes of the onward march of the race. Physical comforts, control over nature through understanding of its laws—these have given added stimulus to the quest for knowledge.

The remaining factors may, perhaps, be disposed of in shorter order. The conception of biological evolution, whatever merits or demerits as a scientific theory it may have, has perpetuated the viewpoint that the race is practically inevitably to progress, to reach a higher form of existence; and that all forms of social control, including the legal order, must be but means toward this pre-destined goal.[11] A third factor may be said to be the agitation for a reconstruction of human society believed to be possible through human effort. From the days of Plato's "Republic" through the Golden Age of Roman writers and Apocalyptic seers of Christian and Jewish times to the present, there have been visions of a new world order, but not until the present have these hopes crystallized into a philosophy of efficacy and partial achievement. Again, a factor to have contributed to the idea of progress may be said to be Rationalism, or a critical revaluing of inherited beliefs and prejudices, involving the assumption that the human mind is capable of its own powers to find reality and truth by means of patient, painstaking empirical study. Lastly, the ever-growing number of thinkers who have helped to create a social mind in which the dominant outlook is one of progress, has been a factor which has served to unify the tendencies which were working independently toward that end.[12]

3. The Courts and the Idea of Progress.

The philosophy of progress has been so all-pervasive in the general thinking of the time that at last it has invaded to some extent the inner wall of the law itself, that is, the reasoning general attitude of the courts. In the words of two profound students of the law:

> New times have been coming—nay are now here. The outermost circle of that wave of scientific rationalism which began in the Darwin-Huxley period has at last reached the Saragossa sea of the law. . . . The theories of the philosophers, the economists, and the sociologists have passed out into the world of general debate and current politics. The fundamentals of the law are discussed by the man in the street. And so the lawyer can no longer afford to ignore them.[13]

It may be objected that the viewpoint just quoted represents that of jurists as distinguished from lawyers and judges, and that in the words of McDougall "in any progressive, highly organized nation, law and lawyers are always one or two or more generations behind public opinion,"[14] and that "the most progressive body of law formally embodies the public opinion of the past generations rather than the generations living at the time."[15] But this generalization cannot any longer be said to be the truth with respect to all lawyers and judges or the laws which both seek to administer; a growing minority of the legal profession is being leavened by the introduction of new ideas from

9. Whatever germs of thought existed prior to the present time or the nineteenth century, involving the conception of progress, were not sufficiently systematized or formulated to have much influence on the thought of the time. Bury, The Idea of Progress, ch. 1.

Within Christendom, itself there were, of course, certain types of messianic hope which were connected with a belief in a future golden age of righteousness and perfection. And such an outlook was occasionally found among even Egyptian, Babylonian, and Grecian thinkers. But all these views were largely sporadic and ephemeral, stated usually in terms of providential intervention with which man and his will had nothing to do, and were therefore of practically no effect upon the legal order itself. See Case, The Millennial Hope, chs. 1-5.

10. Kocourek & Wigmore, The Rational Basis of Legal Institutions, Introduction pp. xxix.

In confirmation of Mr. Justice Holmes' statement one need but glance over the impressive bibliographical material of Bury's "Idea of Progress" dealing with the writers who during the past seventy-five years have contributed toward this progressive outlook on life.

11. McGiffert, The Rise of Modern Religious Ideas, chs. 2-5.

12. Though the three stages, of theology, philosophy, and science through which mankind has progressed, according to the Frenchman Comte may be now discredited as too simple a generalization, nevertheless this effort to find a law in human progress stimulated numbers of other thinkers to concentrate upon the inquiry, and, while no definite laws have so far been advanced as a key to progress, the various speculations upon the subject have been influential in sustaining interest in progress itself.

13. Messrs. Kocourek & Wigmore, The Rational Basis of Legal Institutions, Preface, p. xx.

14. The Group Mind, p. 265.

15. Ibid., note 14, p. 266.

without the legal order which, it is believed, make for progress and advance. So far as the courts themselves are concerned, the significant changes in general thinking and the birth of a new philosophy of life, have not left them unaffected, as if like medieval monks they were entirely isolated from the mundane affairs which make the law. Much of our criticism of the courts in the immediate past has been misdirected; many of our difficulties were rather with the dominance of an exclusively historical or an analytical jurisprudence, which made for stagnancy rather than progress. As has been well stated by Dean Pound:

> In the last century two ideas dominated Anglo-American legal science. One was the idea of rule, the conception of law as an aggregate of rules of law of the sort that we find in the law of real property—an idea which still governs in English analytical jurisprudence. . . . The other is the idea of absolute principles of universal validity, derived from the philosophical jurisprudence of the seventeenth and eighteenth centuries.[16]

Today we are observing an increasing number of courts assisting in the movement engendered by the idea of progress, and particularly on those questions where a given juristic viewpoint will turn the scales of justice in favor of or against the law which is supposed to represent this philosophy of progress; in fact, our large difficulty may come to consist in the tendency of courts to inject personal viewpoints too freely into their decisions, which practise in the long run may itself lead to thwarting the so-called progress of the race.

Selecting at random a few opinions, without the intention of exhaustive illustration, one can see at once to what extent the idea of progress is percolating beneath the calm exterior of the "Is of the law," so far as the courts themselves are concerned. In the case of Schlesinger v. Quinto,[17] where precedent was wanting to permit a labor union to enjoin an employers' association from breaking a contract, the court in permitting the suit to lie, said, among other things, that "that progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, can not be ignored by the courts. Our decisions should be in harmony with that modern conception, not in defiance of it." Again, in the recent case of Ware v. City of Wichita,[18] the Kansas Supreme Court in sustaining a zoning ordinance said that "with the March of the times, the scope of legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be"; while the Supreme Court of Minnesota,[19] in holding that a city might own and operate a municipal fuel yard, declared that "economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so of a private character," but that today conditions are different. The Supreme Court of Ohio, in discussing the question whether or not an employer might be held in open liability for having neglected a "lawful requirement," declared that for dealing with industrial accidents prior to workmen's compensation laws, there "had grown up a system of technical rules and ancient precedents of feudal days, ninety-nine per cent judge made," and that "the old order of dealing with personal injuries and deaths in the industrial life of the state, had become a byword and a shame."[20] It is unnecessary, and would amount to prolixity, to cite other instances of a dynamic outlook appearing to be growing in certain directions, despite the fact that a large number of judges may look askance at ideas alleged to be progressive; the method of selection of judges may be controlling.

4. Creating New Premises, Eliminating Inherited Legal Dogmas

It is not alone, however, in the opinions of some courts that there is to be found express recognition of the influence of the idea of progress; in the entire legal order there has come and is coming more and more a profound and far-reaching transformation, in outlook, in dogmas and in legal institutions. Without attempting exhaustive analysis, perhaps it may be said that these transformations or developments consist at least of the following: (1) Equalitarianism and Realism; (2) Pragmatism; (3) Paternalism; (4) Empiricism; (5) Criticism; (6) Uniformism. A description of each movement may be of interest.

(a) *Equalitarianism and Realism*

This tendency in the law may be described as the attempt through law to make the de facto inequality of human beings coincide with the assumed de jure abstract equality, inherited from a time of individualistic philosophy.[21] Striking exemplification of this movement is found in the effort to elevate the inferior position of the workingman to the superior bargaining power of the employer; the past, in an era of individualism and small-scale industry, had assumed this equality, the present, in an age of group activity and industrialization, looks beyond appearance to reality, and, finding actual inequality, seeks to remedy it. The initiative comes largely through legislation; for most courts, still immersed in the individualistic juristic philosophy of the past century, either do not grasp or they ignore the fact that there is often this chasm between natural inequality and abstract equality. Too often we find courts in their opinions postulating the premise that everyone has an equal opportunity to secure a place in the struggle for existence; but when this premise is applied to the efforts of a single workman seeking a market for his services against machinations of a powerful labor union or against the powerful employers' association which exacts from him non-union allegiance, then it is at once patent to what degree the inherited premise of equality has become an instrument of injustice.

This movement here denominated Equalitarianism and Realism has ramifications of wide extent. Briefly, it may be said to be the inspiration or *leitmotif* of the movement for small claims courts, the idea be-

16. "The Law School and the Common Law" address before Harvard Law School alumni, Cambridge, June, 1920. (Pub. by Harvard Law School Assn.)

17. 192 N. Y. Sup. 564,569. A coterie of French legal scholars have sought to portray the growing liberalization in judicial thought. See in particular "La Lutte Judiciarie du Capital et du Travail Organises aux Etats-Unis," par Lambert & Brown; also "Le Gouvernement des Juges et la Lutte contre la Legislation Sociale aux Etats-Unis," par M. Edouard Lambert.

18. 214 Pacific (Kans.) 99, 101.

19. Central Lumber Co. v. Waseca, 188 N. W. (Minn.) 375.

20. Patten v. Aluminum Castings Co., 136 N. E. (Ohio), 436, 440-41. Until changed by constitutional amendment denying open liability on the employer, this court was divided on the question whether or not given lawful requirement was sufficiently definite to impose liability on the employer at common law for having neglected it. The dissenting opinions maintaining that "lawful requirement" was sufficiently definite, finally became the prevailing opinion, resulting in overruling a number of other contra holdings. See Ohio Automatic Sprinkler Co. v. Fender, 141 N. E. (Ohio), 269.

21. Felix Frankfurter, Hours of Labor and Realism, 29 Harvard Law Review, p. 353.

ing to bridge over the gap which has been found to exist between actual inequality in the administration of the law, on the one hand, and, on the other hand, the abstract theory of a uniform law for rich and poor alike; it is likewise behind the movement to obtain a public defender for the accused poor, for similar reasons; lastly, without attempting complete enumeration, it is the motive in workmen's compensation laws which abolish common-law liability against the employer, the theory being that it is better to guarantee to the injured party or his personal representatives a minimum sum, without court costs or attorneys' fees, than to permit suit to open liability for an excessive amount, most of which may, if recovered, go to parties other than the claimant.

In the words of a late German jurist:

> In earlier time people failed to understand that the legal establishment is an intricate structure under which the most various elements must be able to develop; and here, as well as elsewhere it was thought possible to control a whole mass of cultural phenomena with a single principle.[22]

The single or monistic principle with which the Common law has sought heretofore, and to a large extent even now, to deal with these problems has been by the abstract equality conception. Empirical study, under an idea of progress with new conditions and pressure of compelling interests, compelled the legal order within the past decade to abandon or qualify this juridical monism; pluralism and realism have taken its place.

(b) *Pragmatism and Economic Progress*

By Pragmatism is here meant the tendency, found both in judicial opinions and statutory enactments, to abandon metaphysical or logical exposition of received legal dogmas and inherited legal doctrines, and, in certain instances through the device of construction or interpretation, the doctrines themselves—all in the interest of furthering a material and economic progress. This movement cannot be better described than it has been by Kohler:

> Human rights are not advantageous to every development; technical arts must advance; humanity must make progress in industrial life, and for centuries this goes on with the sacrifice of human life. The sacrifice to culture is the highest sacrifice that the individual can make, but it is also one that he must make.[23]

In Common law countries this pragmatic movement is best seen in the conflict between the so-called police power and vested rights, on the one hand, and on the other, in the difficulty involved in applying a written constitution to the ever-changing kaleidoscope of human affairs. In Hadachek v. Los Angeles,[24] the federal Supreme Court in upholding an ordinance interdicting brickyards within a certain area, although thereby the complainant was deprived of valuable and costly property, used language strikingly similar to that of Kohler, saying:

> A vested interest cannot be asserted against it [the police power], because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.

This movement to subordinate individual claims to an assumed progress is to be found in a statute which imposes criminal liability for breaking one's contract at the very moment when he is most needed by the employer in furthering the latter's economic interests, or where the penalty is imposed upon a second employer who with knowledge that the employe has breached his contract with a prior employer, nevertheless gives him employment.[25] It is again found in those court decisions which deny the strike to compel a closed shop, because it is thought that industrial paralysis, and therefore cessation of economic progress, will result; for logically, if one workman might lawfully quit his employment, there is no tincture of illegality if a number decide to do so. Again, pragmatic considerations are often controlling in delimiting the territory between the States and the Federal Government, depriving the semi-sovereign states of their duty and right to supply first their own citizens with the necessities of life; or, under the doctrine of political questions, vaulting the barrier between State and Federal jurisdictions by paving the way for numerous federal experiments in intra-state activities. Without further particularization, then, one observes on many sides inherited legal doctrines dissolving within the capacious maw of pragmatism, or what is best in view of an assumed racial and economic progress.

(c) *Paternalism*

Sidgwick defined Paternalism as government interference "commanding a man, under penalties, to do what he does not like—or not to do what he likes—for his own good."[26] This definition can be expanded somewhat by clarifying the ambiguity "for his own good," to include both direct and indirect benefits; for where the former cannot be easily found in a given interference on the part of the State, yet by compelling the individual through state force to curb his otherwise unrestrained activities, or compelling action where otherwise there would be inaction on his part, his duties to others are not violated, and as a consequence, he is free from liability to them, and this is for his own good. But whether an expanded or a restricted meaning of paternalism be adopted, it must somewhere appear in justification of regulation of external acts that a resulting good occurs to the individual, although he himself may fail to see the element of benefit. For example, among the numerous attacks made upon a law prohibiting night work of women is the familiar one that complainant desires to work at night and does not find this work deleterious to her own health but financially un-remunerative to her if she does not work. In the recent case of Radice v. New York,[27] the Federal Supreme Court in sustaining the New York statute prohibiting in certain businesses the night work of women, said:

> The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the State is that night work of the kind prohibited so injuriously affects the physical condition of women and so threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the state to preserve and promote the public health and welfare.

The court then further declares that, although a woman may believe that night work is not injurious

22. Josef Kohler, Lehrbuch der Rechtsphilosophie, 3d ed., p. 112.

23. Note 22, ibid., p. 113.

24. 239 U. S. 394. Professor Oliphant has admirably described the method by which, when logic is inadequate in reaching a result desired by a particular court, resort must be had to reasoning "on principle" or "on grounds of public policy." See "The Relation of Current Economic and Social Problems to the Restatement of the Law," pp. 19-20 (Pub. by Academy of Pol. Science, New York).

25. See cases collected by Lindley D. Clark, "Labor Laws That Have Been Declared Unconstitutional," Bul. No. 321 U. S. Bureau of Labor.

26. Elements of Politics, chs. 4, 9.

27. 44 Sup. Ct. Rep. 325.

to her health, the State after a lengthy investigation into the conditions under which night work is performed, has been led to enact this legislation on the ground that such work is injurious, and that therefore there will be no judicial review of this finding. Hence, the paternalistic State knows better than the individual whose conduct is to be restricted, whether or not the restriction as for his own good.[28]

Closely allied to the paternalism which has been pointed out, is a development restricting individual and group activity not primarily for the good of those under these regulations, but rather for third parties or for the general public. The justification here is not always the police power, but quite often the attempt to actualize the assumed equality of opposing groups in the economic life. For example, a statute requiring employers under criminal penalties to pay wages in cash at certain intervals may have only remote connection with some benefit to themselves, but is primarily aimed at improvement of the economic condition of employes. By some, regulation of this character is classed with paternalism, but this can hardly be said to be the case; it is simply regulation, not for the one who is subject to the law, but rather for some third party or parties.

To enumerate the various types of governmental interference within the sense either of paternalism or of restrictions upon liberty generally, would amount to prolixity; these developments have so entered into our activities within recent years that they are very well known. The more important query is, What have been the causes of this paternalistic or restrictive movement, and what will be its future? So far as America is concerned, perhaps it may be said that the "decline of liberty"[29] in America began with the Granger cases and the anti-trust statutes, and in both rate regulation and control of combinations and public service corporations, there has been a steady inclusion of businesses and their practices within the realm of regulation by some statute, enforced by a particular administrative body. The tentacles of regulation thereafter spread to the employer-employe relationship, due perhaps to the growth in power of the laboring classes who were strong enough to compel legislation in these fields, but due also to a recognition on the part of the public that it itself would be served by this restrictive type of legislation. Lastly, the movement seems to be gaining headway within the field of regulation of trade generally, where it is felt that although the businesses to be regulated are not public service companies, nevertheless they stand in such peculiar relationship to the public that it is justified in self-protection to prohibit certain heretofore permissible activities.

Certain publicists are alarmed at the continual inroads made upon the ancient liberties by this flood of legislation, enforced by administrative tribunals, and it is feared by them that bureaucracy and republicanism will eventually disappear unless this movement is somewhat checked. Concededly, much of our "paternalistic" legislation is unnecessary or unwise, and it is well that we scrutinize carefully innovations upon human relationships and activities which have had survival value in the struggle for existence. On the other hand, it is doubtful whether there will be or can be a reaction[30] in favor of the easy-going individualism and laissez-faire of preindustrial times. Enunciation of such a return may be an excellent shibboleth for political purposes, but conditions in the social and economic world of today are too complex, society is too completely industrialized and population is growing too rapidly, with a consequent shrinkage in raw materials, for a program of nineteenth century laissez faire to succeed. It is therefore safe to say that paternalism with its concomitant, allied movement of restrictive regulation, will be the tendency for a long time to come, with occasionally an abortive attempt by some court to stem the tide; but in a changed world this movement is to a large extent necessary if a residuum of liberty is to remain at all.

(*d*) *Empiricism*

The belief that the legal order must take cognizance of the results and methods of science, if it is to further the progress of the race, has gained currency within the past decade. The very fact that the social institutions with which the law must deal have themselves made great progress has called attention quite forcibly to the status of the law itself. Furthermore, the demands of industrialism for business-like methods of administering justice, coupled with the predilection for speed and achievement so characteristic of the present era, have caused dissatisfaction with a legal system inherited from days of less complexity of social structure, when agriculture instead of industrialism, and scattered instead of congested populations were the dominant characteristics.

This empirical or scientific movement in the law is traceable in a number of directions. So far as it is an adoption of scientific methods, as distinguished from the discoveries of science, we observe it in re-organization of the judicial system in order to make provision, in the unified court with its council of judges, for a union in one body of the administration and enforcement of the law, giving rise to flexible rules of procedure, clearing up dockets by assignment of judges, and collection of data and statistics to serve as a basis for continual improvement of the legal machinery. The scientific methods are also observable in the movement to improve the drafting of statutes, to modernize the rules of evidence in order to conform to the best practice of business men; to permit boards and commissions to proceed without observing technical rules of evidence; to provide for arbitration in controversies arising out of highly technical business practices or highly controversial subjects, such as the relationship of employer and employe—where the courts may proceed too slowly, or where it is believed the law which courts administer in solving these problems is inadequate.

So far as it is the adoption of the results of science, we likewise observe very significant developments. Psychopathic laboratories in our larger cities have made important contributions to the more intelligent solution of the problem of crime prevention, by providing our courts with reliable data and studies on the abnormal mind. The re-

28. It should not be inferred that the author is hostile to legislation of this type; on the contrary, he is sympathetic with social legislation generally, if on a weighing of all the social interests involved, constitutional or otherwise, the social consciousness enacts reasonable methods of accomplishing it.

29. See the humorous remarks of Dean Pound on the "decline of liberty" in England due to the "reign of law." Growth of Administrative Justice, 2 Wisconsin Law Review, 321.

30. When Adkyns v. Children's Hospital, 261 U. S. 525 was decided, holding the District of Columbia minimum wage law for women and children invalid, it was predicted by some that the decision was symptomatic of a reaction against this paternalistic movement. But this position cannot be maintained, for since then this same court has sustained other far-reaching restrictive laws of as great importance as that overthrown in the Adkyns case. Cf. Radice v. New York, 44 Sup. Ct. Rep. 325 the Recapture Clause case, 44 Sup. Ct. Rep. 169, and others of similar character.

cent report of the Canadian Bar Association[31] is the latest pronouncement with reference to this movement in the law, and surely it cannot be said that this is a radical or impracticable plan. In imposing liabiltiy upon the father or one *in loco parentis* for having neglected to furnish medicinal care to those under his charge, because of his religious scruples; in upholding the practice of vaccination as a prophylactic to disease, even though thought by many to be inefficacious, the legal order is seeking to further the postulates of science at the present time, which has for its ultimate goal the gradual domination of the race over environment.

(e) *Criticism*

By criticism is here meant the disposition, found in a growing number of judicial opinions as well as briefs of counsel, to re-examine the decisions of the past, either on the ground that these holdings were analytically unsound, or because now, due to a changed social and industrial order, they are no longer socially functional or valuable. Our traditional doctrine of stare decisis has been, as a result, called into question; so that, while we still give it lip service, and perhaps do actually follow it in the field of vested, or property and contract interests, in other fields of the law the exceptions to the rule have well-nigh caused the rule of precedents to disappear.[32]

Briefly, it may be said there are a number of reasons why stare decisis has been called in question at the present time. The first and perhaps outstanding one is the tendency to overrule quite freely the reasoned opinions of the past, sometime explicable on the ground that there has been a change in judicial personnel since the prior precedents were handed down.[33] Especially is this likely to be the case in jurisdictions where industrialism is more pronounced than in others.[34] A second reason for saying that stare decisis is not a living doctrine in actual practice may be said to be the long-established habit of distinguishing the cases on their facts, so that the prior precedents are not applicable to the case at bar.[35] Furthermore, in a given jurisdiction a precedent within a certain field of law may be wanting, although a sister State may have settled the question; but in view of the fact that every court feels itself competent to determine what is the law, one cannot be certain that the precedents of a sister state or those of any other jurisdiction will be followed. Hence, we have the appearance of certainty, but as a matter of fact it is lacking.

Again, the nature of certain fields of law is such that a court either cannot or will not define with accuracy a legal rule or doctrine sufficiently to cover all the conceivable cases which may call for its application. This is particularly true with respect to standards as differentiated from rules. No court can define, nor should it do so, for all future cases, what is "unfair competition," what is a "reasonable rate," what is "due process," or what is "fraud."[36] Hence, on all these matters stare decisis is unavailing.

Lastly, it may be said that the tens of thousands of new cases coming into the courts each year show that even among counsel there is thought to be a fighting chance to upset some precedent, or to create one where there is none. Unauthoritative guesses of counsel have been a cause of the movement for declaratory relief, litigants or would-be litigants preferring an authoritative decision from a court rather than the "guess" of counsel, no matter how able the latter may be.

Undoubtedly, this critical movement which is undermining stare decisis in certain directions, is sincere in its objects; for its justification is to enable the legal order to progress from a situation of inadaptibility to present needs, from a situation where by-gone rules and doctrines are applied in a mechanical manner, often resulting in injustice or a failure of justice, to one of dynamic growth and concrete justice for the various parties to the litigation. But that uncertainty in the law is inevitable, cannot be denied. This disadvantage, however, must be weighed with the social interest that the law move forward rather than remain stagnant; and the present era, under the influence of the idea of progress, has definitely chosen that the law move forward, and that a mere doctrine, whether it be stare decisis or some other received doctrine which stands in the way, must be either abandoned or qualified in order to enable the legal order to be a means to an end.

(f) *Uniformism*

The belief that racial and economic progress will result if there is a uniformity of law throughout the United States, is the theory behind what is here determined "uniformism." It is the inspiration also in international schemes for the amelioration of the condition of the working classes, where, of course, there is the added reason of equating, as far as possible, the conditions of competition among the various powers. More recently, however, these international programs have taken cognizance of the dissimilarities of geography and industrial conditions, and have therefore modified somewhat the various schemes advanced. It is, therefore, largely with respect to inter-state relationships in America that the doctrine of uniformity is given considerable attention.

This passion for uniformity has attained realization, as is well known, in fields of contract and property; and many are the programs put forward in other fields of law; and where constitutional hindrances are present, amendments—as for instance that of child labor in the federal constitution—are suggested to make room for legislation believed to be wise and necessary. Undoubtedly, there is merit in many of these proposals for making the laws uniform as far as possible, and especially in certain fields of human activity which peculiarly lend them-

(*Continued on page 492*)

31. 7 Journal Amer. Jud. Socy., 135.

32. "Stare decisis is ordinarily a wise rule of action. But it is not a universal inexorable command. The instances in which the court has disregarded it are many." Brandeis, J., in State of Washington v. Dawson & Co., 44 Sup. Ct. Rep., 302, 309.

33. Powell, The Judiciality of the Minimum Wage, 37 Harvard L. Rev. 545.

34. Cf. the devious way the Supreme Court of Ohio has followed in construing the term "lawful requirement" in workmen's compensation laws. Ohio Automatic Sprinkler Co. v. Fender. 141 N. E. 269.

35. Judge Hough has admirably illustrated this in federal supreme court decisions with respect to admiralty jurisdiction. See "Admiralty—Of Late Years," 37 Harvard L. Rev. 529.

36. Perhaps it would be unwise to define certain standards for definition means delimitation; as a consequence ingenious parties might be able to evade the definition laid down by the court which would lead both to injustice and to interference with the administration of jusice itself.

Moreover, in certain provinces of the law deductive logic will not avail to do justice to the complex relationships of the various litigants. In the words of Pascal: "Concrete truth is never reached by the syllogism. . . . In the world of sense we have to do with things, not with notions, with concepts. Logic, science, never reach the particular, the concrete, the individual." T. J. McCormack, "Paragon and Paradox," American Review, September, 1933, p. 8.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

Among Recent Books

A *HISTORY OF ENGLISH LAW*, by W. S. Holdsworth. In seven volumes; volumes I to V. Boston: Little, Brown & Co. Pp. xlv, 706, xxxi, 661; xlv, 695; xxxii, 600; xxvii, 529. $6.00 a volume. The first five volumes of Holdsworth's history of the English law have just been published. To review them in the manner to which the position and the learning of their author and the scholarliness of his work entitle them would require careful research and accurate analysis not possible unless an extended period of time were available to the reviewer. In view, however, of the coming trip to England of the American Bar Association it seems advisable to give some notice to these books before sailing time, even though such notice can be little more than a description of their contents, and certainly cannot be a critical appreciation of their significance in the historiography of the common law.

Volume I originally appeared in 1903, and then as now, dealt, not with any rules of substantive law, but simply with the machinery of justice, that is, with the history of the courts and of the jury, the means of making proof, etc., and with what we now lump under the term "adjective law." The reason assigned for making this the beginning appears at the very opening of the text: "The rules which govern the jurisdiction and the procedure of the courts are the substantive part of early bodies of law. As these courts increase in power and enlarge their jurisdictions, the law which they apply gradually becomes more important than the courts which administer it and the procedure by which it is administered. . . . [But] the historian of any legal system must begin his tale in the days before the courts have made much law. Legal history therefore must always begin with the history of the courts." In setting forth this history of the courts the same arrangement of topics has been followed as in the first edition but in a much expanded form, and indeed the new matter is so extensive as to warrant his statement that the present volume I is "a new book." This revision of the subject matter, we are told in the preface, was due in part to the broadening of the author's plans whereby this book had become merely a part in a much larger whole with which it had to be co-ordinated, and in part to the changed views held by him as a result of nearly twenty years of further research. The description of conditions prior to the Conquest is naturally very brief, and the bulk of the space is devoted to the period commencing in 1066 and ending with the great movement for reform in the early half of the nineteenth century. The last chapter describes the reform movement and paints a brief picture of the situation today as a result of the Judicature Acts.

Volumes II and III have also appeared previously, their first edition being dated 1909. They deal with the substantive law from Anglo-Saxon times up to the accession of the Tudor dynasty in 1485, and while not wholly rewritten as in Volume I, are very fully revised, so that scarcely a page appears as it first did. Occasionally the changes are more striking. Thus there is a complete new chapter in the discussion of the sources of the mediaeval law, which deals with the intellectual, political and legal ideas of the middle ages. As Mr. Holdsworth's constant iteration is that the law is a mere mirror of the social life of the time and as he constantly ties it up with comment on such outside elements, it is especially useful and appropriate to be supplied with a picture of these elements as they then were. Those who have read the first edition will be pleased to find that there is almost no change in the interesting description of the mediaeval legal profession, how they were trained, how they lived, what their relations to each other and to the judiciary were, etc. These one hundred pages may be recommended to anyone as a means of acquiring information not merely in a painless, but indeed in a highly enjoyable manner. New matter of importance in volume III includes an expanded chapter on the law of crime and tort, particularly so far as this involves the concept of possession, and a new section on procedure and pleading in the criminal law.

These three volumes (originally projected as only two) constitute the first plan of the work, which was to cease with the year 1485. The present scheme, however carries the history down to 1700 as to all subjects of discussion and to present day as to some of them.

Strange as it may seem this is virgin soil, none of the previous histories of any importance having gone beyond the end of Elizabeth's reign. Thus Holdsworth has been forced to blaze the way with no opportunity to benefit by observing the errors of others. He is eminently fitted to do so. The scope of the labor is, however only appreciated by a glance at the first two hundred-odd pages of volume four, which have nothing to do with law in a narrow sense. Instead they take up the intellectual and political aspects of the Renaissance and the Reformation and the constitutional history of the English state during the Tudor dynasty, in order to enable the reader to appreciate the significance of the more directly germane matter that follows. The return to direct comment on the law is made with a discussion of the point as to how far the English law at this time was influenced by the infiltration of doctrines traceable to the Roman law. After that the plunge is finally made into a description of the actual rules applied by the courts from 1485 through the early part of the seventeenth century. The enacted law is first treated, together with the economic setting into which it fitted. After that come the rules developed by systems in rivalry to the common law, such as the Law Merchant, the law administered by the Star Chamber, and the greatly expanded rules of equity. The conclusion of volume five describes the famous conflict of the common law with these rivals and as synonymous with it the career and place in history of Lord Coke. What has happened since to the legal system which he did

so much to shape remains to be set forth in the two final volumes yet to be published.

In conclusion it may be noted that Americans are entitled to a pardonable pride in seeing the extent to which American writers are referred to in the prefaces as having made contributions of use to the author.

Privateering and Piracy in the Colonial Period, Illustrative Documents, edited by J. F. Jameson. New York: Macmillan. pp. xxvi, 619, $5.00.—Those who run across this book can account themselves fortunate; they will seldom find any more interesting reading, if they have any imagination at all. Professor Jameson has gathered together a mass of old documents hidden away on both sides of the Atlantic in court records, private collections, libraries, etc., and has printed the most interesting of them, grouped according to the central figures involved. All are authentic and unchanged. Many contain no little unconscious humor, as for instance the pious rogue who forbade gambling on the Sabbath, but held that murder and rapine was permissible; or those others who invested some of their gains in catechisms and bibles for the improvement of their minds; or in the plea of one wretch who was caught and addressed a long and conciliatory plea to his judges which he winds up with the soft words: "Wishin you all happienes, And for the Continewnce of which I shall ever Pray, etc., Subscribe my selfe your Faithfull Subjectt and Searvantt In all Hummillitye." For inclusion in future editions of books of forms there is a most impressive one of an agreement to constitute a partnership in piracy (p. 141). Most of the really élite of the pirate world are not included, such as Henry Morgan, who wound up with knighthood and high government office, or the famous Edward Teach, most feared of all the pirates under his nickname of Blackbeard. Avery, however, is there in all his cruelty, and William Kidd, that strange phenomenon who was so much less significant in his own day and for some unaccountable reason has become so famous today. Page after page of it runs on with its quaint or grewsome tales. Its reading can be begun almost anywhere—it is safe to say that it can be finished only at the last page.

Government and the Will of the People, by Hans Delbrück, translated by Roy S. McElwee. New York: Oxford University Press, American Branch, Pp. xiii, 192. $3.50. The author's thesis is that the will of the people is a pure fiction; except in a tiny community it is non-existent and that which masquerades under this name is only the will of a small group—most frequently the group in control of party machinery. Hence government by the will of the people is an impossibility. This being so, is it wiser to surrender all power to the fraction of the people who do have an organized will (of which England is typical), or is it wiser to erect a dual authority, of which the other half shall be of a non-popular, permanent nature? This matter may take shape in a powerful monarchy, or in a closely knit official class, or in an army, etc.; in any event being permanent it can take a long view impossible for the so-called popular elements in the scheme of government. Delbrück argues for such duality. As the lectures of which this book is a translation, were delivered in 1913, they afford an authentic insight into the political philosophy of the defenders of the pre-war German system. The author is no slavish advocate of the powers that were—even then he was the head of a movement to restore Alsace-Lorraine to France. His vigorous belief in the need of a non-popular alloy in government therefore is far from a mere environmental prejudice. He has set out his views clearly and concisely. Mr. MacElwee's translation ably handles the final step in presenting them to English readers.

Cases on the Conflict of Laws, by Ernest G. Lorenzen, Professor of Law, Yale. 2nd Edition, St. Paul: West. Pp. xxiii, 1906. $6.00. Doubtless in general the practitioner's reaction to a case book is that however useful it may be to a student, it can have little significance to him, and in those broad fields of the common law which have been carefully worked over by our complex system of texts, digests, annotated cases, etc., this is probably true. Conflict of laws, however, still remains largely a virgin land in which in the main only very limited or very inadequate excursions have been made, as anyone who needs to search out a question thoroughly is soon painfully aware. A collection of leading cases would therefore without more be of use to such a person. Their use is tremendously enhanced by the author's practice of winding up every important point with a footnote giving (country by country) the view of the matter entertained in each of the important countries of Europe and South America, with citations to the authorities, whether statutory or case, in which the matter has been considered. So thorough has this canvassing of foreign material been that even pertinent sections of treaties and writing in foreign law periodicals have been gathered in. It is needless to add that the American law reviews have not been neglected. As a result the searcher after a particular point runs a fair chance of having a whole mine of useful material opened up to him. In the matter of printing and paper the book is up to the uniformly high standards of the American Case Book Series. A further convenience is that the index of cases is both by plaintiffs and by defendants.

Further additions to the *Service Monographs of the United States Government* published by the Johns Hopkins Press for the Institute for Government Research (see comment in this department in January, 1924, number) include:

The Bureau of Immigration, by D. H. Smith & H. G. Herring. $1.50.

The Customs Service, by L. F. Schmeckebier. $1.50.

A Treatise on the Law of Corporations in New York, by Alden I. Rosbrook, second edition. Albany: Bender and Company. Pp. clx, 1707. So sweeping were the recent changes in the statutes of New York dealing with corporations that other discussions have become very largely obsolete. This book is designed to fill the resulting need. It is more, however, than a mere reprint of, and commentary on, the new statutes. In its text there are also the appropriate references to wholly different statutes pertinent to the particular points concerned. In the same manner case-law, so far as it is still pertinent, is not neglected. The forms, of which there is a great number, have their usefulness materially enhanced by being very fully annotated and discussed in accompanying footnotes. Despite the speed with which the publishers have produced the book it seems to have been worked up carefully and thoroughly, and although its length would suggest padding, this is disproved even by a cursory examination. The length is simply due to the mass of valuable material of all sorts which has been gathered together.

E. W. PUTTKAMMER.

FEDERAL PRACTICE AS TO EQUITABLE DEFENSES IN ACTIONS AT LAW

Discussion of Section 274-b Judicial Code—A Distinct Innovation in Federal Practice—Equitable Defenses in Other Jurisdictions—History of Act and Contemporaneous Construction—Judicial Interpretations—General Conclusions*

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THE Federal Statute forming the basis for this discussion is section 274-b, Judicial Code, United States Compiled Statutes, section 1251b, and reads as follows:

> In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

Distinct Innovation in Federal Practice

Prior to the Act of March 3, 1915, of which section 274-b was a part, there was no such thing in a federal court as an equitable plea in an action at law, even though such was authorized by a state statute where a federal court was sitting. The wall between law and equity was strictly maintained. It was not allowable to blend legal and equitable defenses in the same suit In the case of Ely v. Elliott, Fed. Cases, 4428-A, a bill was filed in the federal court sitting in California, to enjoin an action of ejectment then pending in the same Court, and praying that the deed under which the defendant in ejectment claimed might be corrected, thus defeating the action in ejectment. The Court sustained the bill, pointing out that in the federal court no other method of relief was available, notwithstanding the fact that if the ejectment suit had been in the State Court of California such relief could have been had by way of equitable plea.

In Scott v. Armstrong, 146 U. S. 499, the Court pointed out that in a case removed from an Ohio State Court a plea of equitable set-off could not be allowed, even though its allowance would have been authorized by state statute if the action had been pending in the State Court.

In Pacific Mutual Life Ins. Co. v. Webb (8 C. C. A.), 157 Fed. 155, the Court refused to permit the plaintiff to prove under a replication that the release relied on by the defendant was procured by fraud and misrepresentation, the court again emphasizing that such reply was of equitable cognizance only and could not be adjudicated by a court of law.

In McManus v. Chollar (5 C. C. A.), 128 Fed. 902, the court held:

> Since the federal courts sitting in Texas observe the distinction between legal and equitable rights, an equitable defense cannot be maintained in an action of trespass to try title brought on the law side of a federal court sitting in that state, though under the state statutes equitable defenses are available in such action in the state courts.

It is obvious that one purpose of section 274b Judicial Code was to remedy the defect in the law pointed out in such decisions.[1]

Equitable Defenses in Other Jurisdictions

By section 83 of the English Common Law Procedure Act of 1854 it was provided that

> It shall be lawful for the defendant . . . in any cause . . . in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense.[2]

Section 2635 Revised General Statutes of Florida is the same in substance. In 1873 the reformed procedure was adopted in England, giving the courts of law many equity powers.[3] Our Supreme Court has held that under the Florida Statute a "plea on equitable grounds" must be purely defensive in character, and that a court of law cannot exercise any power of a court of equity, such as the cancellation or reformation of a contract.[4]

In 1848 the Field Code of Civil Procedure was adopted in New York, abolishing distinctions between actions at law and suits in equity. In 1852 section 150 was added to that code, providing as follows:

> The defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.

After the adoption of this provision in New York it was adopted literally or in substance in many other States, but judicial constructions were not harmonious.

Oregon and Wisconsin statutes, as construed by the courts, apparently contemplate only such equitable pleas or cross-petitions as require affirmative relief.

An excellent discussion of the subject as developed under state statutes is found in an article by Prof. E. W. Hinton, "Equitable Defenses under Modern Codes," 18 Mich. L. Rev. 717.

In Pomeroy's Equity Jurisprudence, 4th Ed. sections 1366 to 1374, inclusive, the author considers at length the subject of equitable defenses in actions at law as applied under various state statutes, and in sections 1368, 1369 and 1373, he defines the general understanding of an equitable defense, and points out that both classes are to be included, i.e., those purely defensive in character, and those seeking affirmative relief.

When Congress passed section 274b Judicial Code the general state of the law on the subject was taken

*Federal and Procedure Regarding Equitable Defenses in Actions at Law: Address delivered by Thomas B. Adams at the 1924 annual meeting of the Florida State Bar Association at Tampa, Fla.

1. Simpkins' Federal Practice—Revised Ed. 1923, p. 42.
2. Day's Common Law Procedure, pp. 8, 9, 328.
3. 1910 Am. Bar. Assn. Repts., page 643.
4. Pensacola Lbr. Co. v. Sutherland-Innis Co., 80 Fla. 244.

into account. All of the state statutes on the subject have not been examined, but it is believed that the exact prototype of the Federal Statute will not be found; if so, the Federal Statute stands on its own bottom and is not encumbered with any construction from some other jurisdiction. And yet the problems that arise under section 274b will to a large extent be solved in the light of experience under state codes.

History of the Act and Contemporaneous Construction

From an examination of the AMERICAN BAR ASSOCIATION Reports I have concluded that the genesis of this law, sections 274a and 274b Judicial Code, is found in a paper entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," read by Mr. Roscoe Pound before the annual meeting of the AMERICAN BAR ASSOCIATION in 1906.[5] Mr. Pound was then a practicing attorney of Lincoln, Nebraska, and is now Dean of the Harvard Law School. In that paper Mr. Pound dealt unsparingly with what he charged were archaic conditions in the practice and procedure of both State and Federal courts. Among other things, he pointed out that no cause should fail because brought on the wrong side of the Court. This evil in the Federal Courts was remedied by section 274a. He pointed out also that in the Federal Courts an "obsolete Chinese wall" existed between law and equity. Section 274b did not obliterate this wall, but it did provide that the Court could entertain both legal and equitable issues in the same suit.

This paper of Mr. Pound provoked much discussion, and its critics charged that it was destructive and not constructive. Nevertheless the Bar Association referred the paper to the Committee on Judicial Administration and Remedial Procedure.

In 1907 that Committee reported to the annual meeting of the Association[6] that the evils pointed out by Mr. Pound existed and that remedies should be sought. To that end they recommended that a special committee of fifteen members of the Association be selected for their peculiar abilities and special study "To suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation."

At the annual meeting of 1908[7] and at the annual meeting of 1909[8] this special committee of fifteen reported much progress, and proposed a number of bills to be pressed in Congress.

By 1910 the demand for procedural reform had become wide-spread. In President Taft's annual message to Congress on December 6, 1910, he pointed out that procedural reform was one of the "crying needs" of the nation. Many state bar associations had taken up the slogan. At the annual meeting of the American Bar Association in 1910, Mr. Pound, then Professor of Law in the University of Chicago, presented the frame work of a practical program of procedural reform.[9] As a part of this program Mr. Pound recommended the following:

> V. The equitable principle of complete disposition of the entire controversy between the parties should be extended to its fullest extent and applied to every type of proceeding.
>
> To give effect to this principle four propositions may be suggested:
>
> (1) The Courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.

In support of this proposition he quoted the New York Code and sub-section 7 of section 24 of the English Judicature Act, which provided the same thing in substance. Section 274b embodies the principles of Mr. Pound's recommendation.

At the meeting of the American Bar Association in August, 1911, the special committee of fifteen submitted a draft of and recommended the passage of a bill to amend Chapter 11 of the Judicial Code by adding sections 274a and 274b.[10] At the same meeting Mr. Pound rendered a sub-committee report in support of that bill.[11] He concluded first, that the bill was constitutional; second, that legislation was a competent method to secure the remedy. "Thirdly," he says:

> We must ask, what reforms in the relation of law and equity in federal procedure are desirable? It is submitted that three are desirable at once: (1) power of amendment from law to equity and vice versa; (2) power to allow equitable defenses and equitable replication at law; (3) power to grant ancillary equitable relief in pending legal proceedings without requiring an independent suit with new process. . . .
>
> The second proposed reform involves three items: (a) allowing equitable defenses at law, (b) allowing equitable cross demands in legal proceedings, where, to make one's defense he must have affirmative equitable relief, such as reformation, cancellation or specific performance, (c) allowing equitable replications at law, as for instance where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud.

He then points out that equitable defenses, some defensive only, others for affirmative relief, had been allowed under the codes of twenty-seven states without any constitutional difficulty. Mr. Pound served on the Association's special committee from its inception, and his analysis and exposition of this law is of great value, although he credits Mr. Everett P. Wheeler, Chairman of the Committee, as being the actual draftsman of the bill.

The report of the American Bar Association's special committee for 1912,[12] and the Congressional Record, 62nd Congress, show that on December 21, 1911, Senator Elihu Root introduced this Association Bill in the Senate.[13] Also that on December 20, 1911, Judge Clayton introduced the same bill in the House.[14] The Association Bill as introduced by Senator Root passed the senate February 5, 1912. In the same Congress Judge Clayton on January 18, 1912, introduced another reform bill,[15] as to which the Bar Association has taken no action. Judge Clayton's bill was debated, and passed the House February 7, 1912.[16] The first section of his bill provided for a transfer from equity to law, if it developed that the suit should have been brought at law, but contained no provision for transfer from law to equity. The second section of the bill provided for amendments as to citizenship. Neither the Association Bill nor Judge Clayton's Bill passed both Houses during that Congress.

In the 63rd Congress, on April 7, 1913, Senator Root again introduced the Association Bill, then known as the "Law and Equity Bill."[17] On May 1, 1913, Judge Clayton again introduced the Association Bill, but this time amended it by adding section 274c, pro-

5. 1906 Am. Bar Assn. Repts., pp. 11 and 12, 55 to 65, 395 to 417.
6. 1907 Am. Bar Assn. Repts., pp. 505 to 512.
7. 1908 Am. Bar Assn. Repts., pp. 542 to 564.
8. 1909 Am. Bar Assn. Repts., pp. 528 to 609.
9. 1910 Am. Bar Assn. Repts., pp. 635 to 650.
10. 1911 Am. Bar Assn. Repts., pp. 448 to 468, Draft of Bill p. 468.
11. 1911 Am. Bar Assn. Repts., pp. 470 to 482.
12. 1912 Am. Bar Assn. Repts., pp. 557 to 566.
13. Cong. Rec. 62nd Cong., 2nd Sess., p. 591—S. 4029.
14. Cong. Rec. 62nd Cong., 2nd Sess., p. 580—H. R. 16460; 1912 Am. Bar Assn. Repts., p. 558.
15. Cong. Rec. 62nd Cong., 2nd Sess., p. 1805—H. R. 18236.
16. Cong. Rec. 62nd Cong., 2nd Sess., pp. 1804 to 1807.
17. Cong. Rec. 63rd Cong., 1st Sess., p. 53—S. 95.

viding for amendments as to citizenship.[18] This Bill as last introduced by Judge Clayton became a law by Act of Congress March 3, 1915. While this bill was pending in the House Mr. Everett P. Wheeler, at the instance of Mr. Dupré of the House Judiciary Committee, prepared a report on the bill which was adopted by the Judiciary Committee.[19] That report pointed out, among other things, that section 274b enables the Court in one suit to deal with the whole controversy, and obviates the expense and delay that would be caused by a separate suit; also that the proposed legislation was in strict harmony with the provisions of Federal Equity Rule 30.

At the 1914 meeting of the American Bar Association, Mr. Taft, in his address as President of the Association, gave much attention to the procedural reforms then in progress.[20] Regarding the subject of section 274b, he said:

> It does not prejudice the plaintiff in the suit at law who is seeking to try his issue before a jury that his opponent by pleading his equitable defense and varying the issues is able to defeat his purpose in the same case instead of incurring the delay and expense of securing an injunction to try the case at law and make the equitable issue in another court.

It is a singular coincidence that Ex-President Taft, who advocated this and other reforms, should later as Chief Justice give it authoritative interpretation. The history of the Act and the purposes sought to be accomplished show that Chief Justice Taft's decision in the Liberty Oil case, 260 W. S. 235, was a logical result.[21]

Judicial Interpretations

Time to File Plea.—Section 274a Judicial Code allows amendment at "any stage of the case," and when it appears there should be a transfer from law to equity, or vice versa. Construing section 274b in pari materia, like time should be allowed for the filing of an equitable plea. Again, section 274b was intended as a substitute for the old practice of filing a bill to enjoin an action at law. Such bill could be filed at any time before trial.[22] Hence such a plea should be allowed during a like period. It was so held in the Huff case by the District Court, and by the Court of Appeals.[23] The Court, however, has the power to control an abuse of the right, for if the plea on presentation states no equity, the Court may refuse to permit it to be filed—disallow and dismiss the same if the time under the rules has elapsed.

Right to File Permissive.—The first sentence of section 274b says, "equitable defenses *may* be interposed," etc. Therefore, the remedy provided is not exclusive of the right to file an independent bill seeking the same relief. In Fay v. Hill (8 C. C. A.), 249 Fed. 415, a bill was sustained seeking a decree declaring two contracts void, and enjoining the prosecution of a pending action at law based on those contracts. The losing party insisted that the complainant had an adequate remedy at law, in that he could have obtained such relief, if entitled to it, by way of equitable plea under section 274b. The court, however, pointed out that if such plea had been filed it would have been disposed of in the same manner as the bill, that is to say, before the trial of the issues at law. The same line of reasoning was followed in Clark v. Chase, 64 Atl. 493, with respect to the statute of the State of Maine similar to section 274b. A similar clause found in Federal Equity Rule 30 was, in the case of American Mills Co. v. Surety Co., 260 U. S. 360, construed as permissive.

The right to insist that a certain subject matter constitutes an equitable defense or an equity that will sustain a bill may be waived if the party in whose favor it exists permits it to be tried out before a jury. Such was the holding in Lyons v. Empire Fuel Co. (6 C. C. A.), 262 Fed. 465. Therefore, if the defendant wishes the equitable matter existing in his favor tried as in chancery he must do one of two things, i. e., interpose his equitable plea in the action at law, or else file an independent bill to enjoin the action at law *before* submitting the matter complained of to a common law jury trial.

Remedy not for Defendants Only.—The first sentence of the section does not stop with answer or plea, but adds "replication." In Union Pac. R. Co. v. Syas (8 C. C. A.), 246 Fed. 561, it was held that when an equitable issue was raised by replication, alleging that a release for personal injury had been obtained by fraud, that this should have been disposed of by the Court sitting as a Chancellor before trial of the defenses and issues at law, and that the submission of such equitable issue to a jury, even in an advisory capacity, was error.

In the case of Cavender v. Virginia Bridge & Iron Co., 257 Fed. 877, Judge Newman, of the Northern District of Georgia, followed the Syas case as to the character of the issue and how it should be disposed of.

But in Manchester Street R. R. Co. v. Barrett, 265 Fed. 557 (1 C. C. A.), the Court held that the issue of having procured a release by fraud, set up in a replication, was properly submitted to the jury, and in the Plews case, 274 Fed. 881 (1 C. C. A.), the same Court held that when an equitable issue was raised by replication it was within the Court's discretion to permit the jury to pass upon such issue. The decision by Chief Justice Taft in the Liberty Oil case undoubtedly shows that both of these decisions by the Circuit Court of Appeals, First Circuit, were erroneous, and that the decision of the Circuit Court of Appeals, Eighth Circuit, in the Syas case was correct.

The Second Sentence of Section 274b is Mandatory.—The second sentence reads as follows:

> The defendant *shall* have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea.

Broadly speaking, this sentence puts at the command of a party pleading an equitable defense all the machinery provided for by the federal statutes and federal equity rules for the handling of equity cases. When an equitable defense is filed in a suit at law such suit automatically becomes to all intents and purposes a suit in equity, and remains so until the equitable issue is disposed of by the Court sitting as a Chancellor, and then, if any issue at law remains, it is triable by a jury as if the equitable issue had not been raised. The wall between law and equity is thus preserved, and the constitutional right of trial by jury is not violated. Chief Justice Taft so held in the Liberty Oil case.[24]

18. Cong. Rec. 63rd Cong., 1st Sess., p. 955—H. R. 4545; 1913 Am. Bar Assn. Repts., p. 548; 1914 Am. Bar Assn. Repts., pp. 33 and 34.

19. House Rept. by Mr. Dupre, No. 162, part 2, 63rd Cong., 2nd Sess., pp. 11458, 12408. See reports in full appendix Cong. Rec., 63rd Cong., 2nd Sess., p. 777; 1914 Am. Bar Assn. Repts., pp. 577 to 590.

20. 1914 Am. Bar Assn. Repts., pp. 361 to 385.

21. See Chief Justice Taft's address, 1922 Amer. Bar Assn. Repts., pp. 259-260. This was the forerunner of his decision in the Liberty Oil case. In that address and that decision, Chief Justice Taft points out that Sec. 274b was a long step forward but that much more needs to be done in the matter of procedural reform.

22. Whitcomb v. Schultz, 223 Fed. 268.

23. Huff v. Ford, 289 Fed. 858; Ford v. Huff, 296 Fed. 652.

24. Liberty Oil Co. v. Condon National Bank, 260 W. S. 235.

In this decision the mandatory effect of the second sentence of the section was emphasized and clearly enunciated in order to put at rest conflicting decisions by inferior courts theretofore rendered.

Many other like consequences may be noted. For example, an equitable plea would not be subject to attack for duplicity because it stated more than one equity.[25]

Again, the method by which to attack an equitable plea is by motion to dismiss, and not by demurrer.[26]

Again, defendant may bring in new parties in the same manner as may now be done by a defendant in an equity suit under Federal Equity Rule 30. New parties were brought in by an equitable plea of interpleader in the Liberty Oil case. In Sherman Nat. Bank. v. Theatrical Co. 247 Fed. 256 (2 C. C. A.) and Breitung v. Packard, 260 Fed. 895, it was held that this could not be done. The Liberty Oil case shows that those decisions were erroneous. But a plaintiff cannot by reply bring in new parties. He can file an equitable reply and have it tried as in Chancery—Syas case *supra*. But if he attempts to bring in new parties he necessarily abandons and departs from the cause of action set up in his declaration. Moreover, the context of section 274b shows that the function of a replication is defensive only to the matter set up in the plea to which it is addressed.

Again, the party filing such equitable plea has the right to propound interrogatories to the opposite party.[27] This right does not exist in a pure suit at law in a federal court, even though allowed by state statute.[28]

Subject Matter of Equitable Plea or Equitable Replication Under Section 274 b.—In general it may be said that an "equitable defense" within the purview of Section 274b consists of

1st: such "a state of facts which, by virtue of doctrines recognized by courts of equity alone, has the effect of barring or rendering unenforceable against a defendant in a suit, the claim asserted by the plaintiff therein"—an equitable bar; or

2nd: such a state of facts as constitutes an equitable cross demand growing out of the same subject matter as plaintiff's suit, "where to make one's defense he must have affirmative equitable relief, such as reformation, cancellation or specific performance," or

3rd: such state of facts which by virtue of equitable doctrines will enable the plaintiff by reply to show the invalidity, on account of fraud, estoppel or the like, of a release or accord and satisfaction or other purported defense set up by the defendant.[29]

Judged by these tests, material, by which to determine the sufficiency of any proposed "equitable defense," may be drawn from at least five sources.

Logically the first source of inquiry would be of cases in which Sec. 274b has actually been applied. Some of these have already been noted, and a few further illustrations will suffice.

In Moore v. Foster Lumber Co., 231 Fed. 1. (5 C. C. A.), the Court, without reference to Section 274b then in force, applied a Texas statute allowing equitable defenses and basing their decision thereon, sustained the equitable defense of laches.

In Burroughs Adding Machine Co. v. S. American Bank, 239 Fed. 179, the action was for the price of certain machines; an equitable plea setting up fraudulent representations inducing the sale was sustained under section 274b.

In Upson Nut Co. v. American Shipbuilding Co. 251 Fed. 707, the equitable plea sought reformation of the contract sued upon, and then enforcement as reformed. The suit resulted in a decree to that effect.

In Ohio Sav. & Tr. Co. v. Harman, 276 Fed. 759, an equitable plea seeking cancellation of the promissory notes sued upon was sustained.

Another field of inquiry would be cases decided under the old practice where bills to enjoin actions at law were sustained.

A third source would be cross-bills in equity suits.

A fourth would be equitable cross-demands growing out of the same subject-matter or transaction, which have been sustained under Federal Equity Rule 30.[30]

And lastly, decisions under the codes of different states will illustrate almost every phase of equity jurisprudence presented by means of equitable defenses.[31]

Section 274b simply provides a new procedure for applying old principles. By resorting to the precedents under old methods of procedure we become the beneficiaries of all past experience.

Appellate Procedure.—Giving effect to the second sentence of section 274b Judicial Code, it is apparent that the right of appeal in case of an adverse ruling upon an equitable plea at once arises. If an independent bill should be filed for the same purpose, and then be dismissed, such right of appeal would immediately exist by virtue of Sec. 128, Judicial Code. If such a plea or independent bill were held to be bad, but amendment allowed, the effect would be to deny a temporary injunction against the action at law giving the right of appeal under section 129 Judicial Code.[32] Moreover it logically follows from Chief Justice Taft's decision in the Liberty Oil case that the rights given by Secs. 128 and 129 Judicial Code would apply.

Similar construction was placed on the Oregon Statute allowing a cross-equitable petition in an action at law.[33]

Immediate appeal was taken from such an adverse order on an equitable plea in the case of Ford vs. Huff, and such appeal was sustained.[34] The Liberty Oil case shows that the proper method to obtain review is by appeal, but in view of the last sentence of section 274-b, and of Section 4, Act. of September 6, 1916,[35] mistakes as to method, whether by appeal or writ of error, are not fatal. One other inquiry may arise—can a defendant by proposing a so-called equitable plea, having no merit, effectually stay the progress of a suit at law, pending an appeal from an adverse ruling as to such plea? No such abuse would be tolerated. Progress in the action at law upon other issues could not be impeded except by a supersedeas order. The granting of a supersedeas is discretionary with the trial court or appellate court, or a judge thereof.[36]

25. Federal Equity Rule No. 26; Paramount, Etc., Co. v. Snyder, 244 Fed. 192; Ford v. Huff, 295 Fed. — (5 C. C. A.).

26. Federal Eq. Rule No. 29; Williams v. Mason, 289 Fed. 812.

27. Federal Eq. Rule No. 58.

28. Exparte Fisk, 113 U. S. 713; Hanks Dental Assn. v. Tooth Crown Co., 194 U. S. 303.

29. Ford v. Huff, 296 Fed. 652. Pomeroy's Eq. Juris., 4th Ed., Sections 1368, 1369, 1372; Dr. Roscoe Pound's Analysis of this law, quoted supra.

30. Hopkins New Federal Equity Rules, 3rd Ed., p. 194; Amer. Mill Co. v. Surety Co., 260 U. S. 360; Wire Wheel Corp. v. Budd Wheel Co. (4 C C A). 288 Fed. 304; Cleveland Eng. Co. v. G. D. M. Truck Co., 243 Fed. 405.

31. See "Equitable Defenses under Modern Codes" by E. W. Hinton, 18 Mich. Law Review, p. 717, and comprehensive note Vol. 36, Harvard Law Review, p. 474.

32. Banco Mercantil Americano De Cuba v. Taggart Coal Co. (5 C C A), 276 Fed. 388.

33. Oatman v. Epps, 15 Pac. 709.

34. Ford v. Huff, 296 Fed. 652.

35. 39 Stat. at L. 727.

36. Rose Fed. Jur. & Pro., 2nd Ed., Secs. 590 and 603.

SHALL THE WORLD COURT BE OPEN TO THE PUBLIC?

Interesting Legal Questions Raised in Correspondence With the Government of the Netherlands Relating to Admission of Visitors to Peace Palace and Sessions of the Permanent Court—American Bar Association Visitors to Have Ready Access to Building This Summer

By JOHN H. WIGMORE
Dean of Law School Northwestern University

I AM sure that the members of the American Bar Association, especially those who are planning the trip to England, will be interested in the question: *Shall the World Court be Open to the Public,* during its hearings of the parties?

On Monday, September 10, 1923, at 12:30 P. M., I went to the Hague to visit the Court, with a party of friends, and was refused admission to the Peace Palace, by a liveried official, at the outer entrance to the grounds; he pointed to a sign on the closed gate: "Admission on Sunday only, 2 to 5 P. M." At that very moment the Court was holding a "public" session. Afterwards, by the fortunate accident of personal acquaintance with members of the Court, I secured admittance to the Palace; but the Court had by that time adjourned for the season. My admission, however, was in spite of the regulation, which remained in force. I saw others turned away as I stood there; and I met Americans on the steamer who had the same experience.

I was shocked beyond measure to find the World Court and the Peace Palace (built by a gift from Andrew Carnegie) surrounded by such mediæval secrecy; and I resolved to take the matter up with the Government of the Netherlands, which I did, on my return to this country. The following correspondence tells the story.

It raises some interesting legal questions, which add to the general interest attaching to this astonishing fact of the privacy of the World Court.

The questions are three:

1. What is the law about publicity of the Court's hearings?
2. What is the practice?
3. Who is legally responsible for the practice?

The answers to these questions, in brief, are:

Ans. 1. The Treaty constituting the Court provides, in Article 46: "The hearings in Court *shall be public,* unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."

Ans. 2. The public regularly was and is not admitted to the Peace Palace, except at hours when the Court is not or may not be in session.

Ans. 3. I don't know, and I cannot find out.

The details of this entertaining controversy can be gleaned from the series of letters which follows. (I note here merely, on the question of fact which occurs in the correspondence, viz., whether it is the Court itself that refuses publicity, that my assertion that the Court itself does *not* so refuse is based on information from a highly credible source which propriety does not permit me to mention.)

LETTER 1

"To: HIS EXCELLENCY, THE MINISTER OF JUSTICE, THE HAGUE.

"From: JOHN H. WIGMORE, Law School of Northwestern University, 31 West Lake St., Chicago, Illinois.

December 14, 1923.

"Your Excellency:

Attention is respectfully invited to the existing regulation of Her Majesty's Government at the Hague forbidding access to the Peace Palace except on Sundays from 2 to 5 P. M.; and the request is proffered that the Department of Government having control of the Palace consider the propriety of changing the regulation so as to permit to visiting foreigners access to the public portions of the Palace, and in particular the Permanent Court of International Justice, at least every day of the week.

"The reason for this request is that foreigners, and in particular American citizens, who desire to include the Peace Palace in their travels, are usually limited by circumstances to a sojourn of only a day or two in the Hague, and that the present restriction to Sunday as the only day for visits makes it impossible for the greater number of travelers to enjoy the privilege. Moreover, since the limitation to Sunday is and must necessarily be unknown in advance to foreign visitors, their expectation of obtaining entrance on other days brings them from long distances to the gates of the Palace only to receive a refusal, which by deranging their plans and defeating their hopes causes keen disappointment and just irritation at a regulation which has no obvious necessity.

"It may be supposed that the regulation originated under circumstances of the past and for reasons no longer valid; because since the world's attention has been aroused by the establishment of the Permanent Court of International Justice and its location at Hague, the Palace and the Court have now become an object of deepest interest to nationals of every country. Is it too much to say that this Palace is now justly becoming a place of pilgrimage for all lovers of peace and law? Has the Dutch Government fully realized how the hopes of the world are centered on this spot? Has it realized that in America particularly the Permanent Court is an especial object of interest, not merely because the building was made possible by the donation of an American, but also because America's share in the Court is now a subject of intense political interest? Has the Dutch Government reflected on the great possibilities of promoting public interest in the Court's prestige by making access easy and frequent? Has the Government reflected on the material advantages to the Hague by encouraging world-wide pilgrimages to visit the Palace? Has the Government reflected on the sentiments of intense dissatisfaction which are now being carried away by the hundreds who are refused admission?

"On a day in September, 1923, I arrived in the Hague, with a party of four persons. Our steamer was to sail from Rotterdam on the next day. We had changed our port of departure from Boulogne to Rotterdam, and had come direct from Geneva to Rotterdam, in order to visit the Palace and the Court. Only a single day remained for the purpose; it was a Monday. On arriving at the gates at 12:30 P. M. the concierge turned us away, because admission was allowed to the public on Sunday only; the notice-board at the gate confirmed this. At the same moment, other persons were being turned away. The disappointment was intense, to speak mildly. On board the ship I afterwards met another American who had suffered similarly.

"Later, on the same day, by a method which I need not explain, I did obtain admission to the Palace, and was shown all of the rooms, which were totally empty. But at that time I learned, to my astonishment, that at the prior moment when I had been refused admission, the Permanent Court was actually holding a *public* session! And yet the *public* was being refused admission to the building by the Dutch Government! The irony of this is obvious.

"Moreover, the Article 46 of the Statute of the Court provides: 'The hearing in Court shall be public.' The Netherland's Government in 1921 signed the protocol for this Statute. Thus that Government is in the singular position of having solemnly assented to the publicity of the Court's hearings, and yet of actively excluding the possibility of public hearings!

"Still further, the Dutch Government is only a trustee of the locality for the benefit of all nations. The Court is not a Dutch Court, and the nationals of all signatory nations, if not of all nations whatsoever, have exactly the same interest and right in the Court as has the Dutch nation. Yet the present regulation treats the building as though it were a private baronial mansion, to which admission is obtainable only by the grace and favor of its proprietor,—like some private villa in Italy or France. Has the Dutch Government sufficiently reflected on the broad international responsibility to hold the building only as a mandatory for the benefit of nationals of all nations? May not the Dutch Government justly take notice of the agreeable contrast shown at Geneva by the Swiss Government in according free admission to the buildings of the League of Nations? Is there any other National Government which does not liberally accord admission even to its national monuments of world-wide interest?

"For the sake of cultivating and encouraging a world-wide pilgrimage to this Mecca of international justice, it is earnestly to be hoped that the Dutch Government will promptly consider the modification of the existing regulation, so as to permit visits to the public rooms of the Palace at least *every day of the week*.

"Copy of this letter is sent to the Secretariat of the League of Nations and to the principal Journals of international law. Any reply which your Excellency deems fit to make will be sent by the undersigned to the same sources. JOHN H. WIGMORE."

LETTER 2

CONSULATE GENERAL OF THE NETHERLANDS
509 FIRST NATIONAL BANK BUILDING
38 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS.

March 4, 1924.

"My dear Mr. Wigmore:

The Netherlands Legation, at Washington, D. C., has requested me to hand you the enclosed translation of a letter from the Board of Directors of the Carnegie Institution to his Excellency, the Minister of Foreign Affairs at The Hague. This bears upon your communication addressed to his Excellency, the Minister of Justice at the Hague, wherein you have taken the Dutch Government to task for restrictions as to the time when the Peace Palace may be visited. . . .

Very truly yours,
Consul General of the Netherlands,
(Signed) J. VENNEMA."

TRANSLATION

"BOARD OF DIRECTORS OF THE
CARNEGIE INSTITUTION

The Hague, January 14, 1924.

"To His Excellency,
The Minister of Foreign Affairs.

"Referring to Your Excellency's letter of the 12th instant of this Cabinet No. 190, regarding the admission of the public to the Peace Palace, I have the honor to inform you that:

"The Peace Palace, during the time that the Permanent Court of International Justice is not in session, is open to the public in the afternoons of all working days (except, during the winter, every two weeks on Saturday). During a session of the Permanent Court of International Justice the Palace, *at the request of the Court*, remains closed to the public on working days and is only open on Sunday.

"The Board of Directors of the Carnegie Institution is always trying to procure admittance to the Palace outside the scheduled hours and to accommodate foreigners as much as possible as far as such does not interfere with the service. Those foreigners, who on account of their short stay in The Hague are not able to visit the Palace during the scheduled hours, should have a special introduction from their Legation.

"The admittance regulations of the public to the public sessions of the Permanent Court of International justice are not drafted by the Carnegie Institution *but by the Court*. In view of the fact that by unlimited admittance of the public the available space would be sufficient, admittance is only granted on presentation of an admission card furnished by the Court.

"Such an admission card may be obtained at the office of the Secretary of the Court.

(Signed) J. P. A. FRANCOIS.

Member and also Secretary-Treasurer of the Board of Directors of the Carnegie Institution."

LETTER 3

"M. J. P. A. Francois,
Secretary-Treasurer
Board of Directors of the Carnegie Institution,
The Hague. Netherlands.

April 1, 1924.

"Sir:

I have been favored by the Consul-General of the Netherlands in Chicago with a letter which you have done me the honor to write, in answer to my letter of December last, complaining of the exclusion of foreign visitors from access to the sessions of the Permanent Court of International Justice in the Peace Palace at the Hague.

"I conceived that my request for a change of this practice should be addressed to the Government of the Netherlands. Your letter informs me that the Court itself is responsible for the practice.

"The question thus arises: Who has authority over admission of visitors to the Palace? In view of the visit of hundreds of American lawyers this summer to attend the meeting of the American Bar Association in London, I trust that you will be so good as to permit the continuance of this correspondence, in order to make clear the facts.

"1. In the monograph 'Vrede Voor Recht' (den Haag, 1913), 'Le Palais de la Paix,' it appears that Her Majesty's Government on 30 June, 1904, created the Carnegie Foundation ('Carnegie Stichting'). (1) By the terms of the decree, her Majesty names 4 of its 5 directors, and the 5th is named by the Administrative Committee of the Permanent Court of Arbitration. (2) The latter Committee consists of the Foreign Ministers accredited to the Hague. (3) The Netherlands States-General voted money to buy the land. (4) Another Committee of Nine is formed by the Netherlands Ministers of Foreign Affairs, Justice, Finance and Marine, Presidents of the Two Chambers, President of the Council of State, President and Attorney-General of the Supreme Court. From the same book, it appears that 'the Government transferred all the property to the Foundation, which from that moment became alone responsible'; that the Directors, 'who received their charter and regulations all prepared by the Netherlands Government, had only to act under these documents, and are only nominally under the supervision of the Government Council of Nine.'

"Thus there were 4 separate groups concerned; and the question is, Who *actually possesses and exercises the authority to regulate admission of the public* to the grounds, to the buildings, and to the sittings of the Court?

"2. Let me at this point eliminate the Permanent Court of International Justice itself.

"In the first place, though Art. 46 of the Court statute says, 'The hearing in Court shall be public, *unless the Court shall decide otherwise* or unless the parties demand that the public shall not be admitted,' yet obviously this proviso is intended only for exceptional cases; and in each such exceptional case the Court would expressly vote. That does not affect the question of the *general* rule of the Statute.

"In the next place, if the Court should make any *general* rule excluding publicity, it would violate the statute. I cannot believe that the Court would do so.

"In the third place, I am credibly informed that the Court has *not* done so. Therefore the statement in your letter, attributing the secrecy to the wish of the Court is contrary to my information, and seems to me to require verification.

"3. In order, therefore, that the world may know where to place the responsibility for the closing of the Court to the people of all nations, I shall request of you the following information, which will be published with this letter:

"(a) Has the Netherlands Council of Nine issued any order as to admission to the Palace?

"(b) Has the Administrative Committee of the Permanent Court of Arbitration issued any such order?

"(c) Have the Directors of the Foundation issued any such order?

"(d) Is there in the Regulations of the Foundation any regulation on that subject?

"(e) By whose order does the notice-board on the Gate read 'Admission on Sunday only, 2-5 P. M.?' And who gives orders to the concièrge at the gate to exclude visitors at other times?

"4. I further invite your attention to the failure of your letter to discriminate important matters.

"(1) Admission to the *Peace Palace* could be allowed while still excluding them from the *Court Room*. Why may not visitors from all parts of the world enter the Palace, even if the Court be not in session?

"(2) Foreign visitors stand on a different footing from local residents. The latter may choose their time; the former may not. Admission at *any* day for the former would be reasonable.

"(3) The liberty (mentioned in your letter) to apply to one's minister for a card of admission is obviously a vain one. *None of the officials of the Palace informed me of that liberty when I applied for admission.* Of what value is it, if none know of it? Your letter states that a 'card of admission may be obtained from the Secretary of the Court.' But the concièrge at the Gate of the Grounds refuses to admit any one to that office. Is it then not a farce to make such an offer? Besides, your letter also says that by order of *the Court* the rooms are closed to the public. Are not those statements inconsistent?

"(4) Besides, such a restriction is a needless obstruction. It is not imposed in any public museum or gallery of paintings in all Europe. It is only imposed in a few private baronial chateaux. Is there anything private or personal in the home of the World Court?

"(5) To summarize the issue which seems to exist between us: I assert as a fact that the public is excluded from access to the Permanent Court of International Justice, in violation of Art. 46 of the Court Statute, an international treaty. I further express the opinion that this is due to action either by the Netherlands Government, or by the Carnegie Foundation, a majority of whose directors are appointed by Her Majesty Queen of the Netherlands. You on the contrary affirm that this exclusion is due to the wish or the ruling of the Permanent Court itself.

"I therefore respectfully request proofs of the correctness of your affirmation.

"(6) But in any event, whoever is responsible, I invoke the action of that authority to put an end to this illegal and unwise practice. This is my sole object.

"I have the honor to be

Very respectfully yours,

JOHN H. WIGMORE."

LETTER 4

"BESTUUR DER
CARNEGIE-STICHTING.

The Hague, April 26, 1924.

"Mr. John H. Wigmore,
Northwestern University School of Law,
Chicago.

Sir:

"In answer to your letter of April 5th I beg to inform you that in 1922 and 1923, during the time the permanent Court of International Justice was in session, the Board of Directors of the Carnegie Foundation was obliged to close the Peace Palace for visitors (except on Sundays), on the request of the Court, according to the agreement concluded in 1921

between the League of Nations and the Carnegie Foundation concerning the establishment of the Court in the Palace.

"On the occasion of the renewal of the agreement in 1924 the stipulation in question has been modified in this way, that during the time the Court is in session visitors may be admitted to the *Peace Palace* also every working-day between 1 and 3 p. m.

"The American lawyers, who will this summer attend the meeting of the American Bar Association in London, will therefore have full occasion to visit the Palace.

"As for the admittance of the public to the meetings of the *Court* this is a matter entirely out of the competence of the Carnegie Foundation, and I advise you to address yourself for information on this subject to the Registrar of the Court.

Very respectfully yours,
(Signed) J. P. A. FRANCOIS.
Secretary-Treasurer of the Board of Directors of the Carnegie Foundation."

LETTER 5

Chicago, Illinois, U. S. A.
May 30, 1924.

"Mr. J. P. A. Francois,
Secretary-Treasurer of the Board of Directors,
of the Carnegie Foundation,
The Hague, Netherlands.

"Sir:

I beg to acknowledge receipt of your very kind letter of April 26, in which you make the agreeable announcement that by recent action of your Board of Directors the regulations for admission of visitors to the Peace Palace have been extended to include 'every working-day between 1-3 P. M.'; so that the members of the American Bar Association wishing to visit the Permanent Court 'will therefore have full occasion to visit the Palace.' This action will, I am sure, be deeply gratifying to the Association. I am taking occasion to bring this action of your honorable Board to the attention of the Secretary of the Association, so that all its members may be notified in ample season to avail themselves of the opportunity this summer.

"Nevertheless, I venture to think that the main object of my communication is still far from being obtained, and I therefore take the liberty of pointing out the following circumstances:

"1. Exclusion from the Peace Palace other than during *the hours of 1 to 3 P. M.* will still prevent access to the sessions of the Permanent Court. On the day when I sought to enter the Palace and was refused, the Court adjourned its morning session at 1 P. M., and held no afternoon session. Of what avail will be an admission from 1 to 3 P. M.? Even if the Court should hold an afternoon session, it would hardly begin before 3 P. M. I respectfully urge that the hours named in your letter are of little or no avail. Why may not foreign visitors be admitted in the morning? If the Court itself should be willing, why should the Board of Directors refuse admission to the Palace in the morning? I respectfully urge that under the terms of the Treaty, Article 46, 'The hearing in Court shall be public, unless the Court shall decide otherwise,' it is the duty of the Board of Directors of the Foundation to admit the public to the Palace itself *at any hours* when the Court, in a room of the Palace, is holding a public session. Otherwise the Board of Directors would be themselves indirectly causing a violation of the Treaty. A treaty is a law of the land, and must be obeyed by every citizen, acting in any capacity, and not merely by the Governments. The Board of Directors are just as much bound, legally and morally, to obey that treaty as is every Government that signed it.

"2. I confess myself unable to find in the agreement cited in your letter, any adequate basis for the action of the Board of Directors in closing the Palace in 1922 and 1923 or in limiting the hours by their recent action.

"(a) In the first place, the 'agreement concluded in 1921 between the League of Nations and the Carnegie Foundation concerning the establishment of the Court in the Palace' is a document for which you give no authentic reference. It must have been concluded by the Council of the League; but nowhere in the published official proceedings ('Official Journal') of the League Council for 1921 or 1922 can be found any reference to such an agreement.

"(b) In the second place, it is not obvious what authority is possessed by the Council of the League of Nations, or any organ of the League, to control admission to the Permanent Court. That Court was established in 1921 by separate treaty, duly signed and ratified wholly independently of Part I of the Treaty of Versailles. No organ of the League has any authority over the Permanent Court. It would be an unwarranted interference for the League to attempt to control in any manner the procedure of the Court. If there is such an agreement, it is void in that respect.

"(c) The terms of the agreement are so strange, as reported in your letter, that the exact text of the agreement should be scrutinized. But your letter does not quote the exact terms. In legal matters, the precise words of a document should be given, to permit all parties to judge of its interpretation.

"3. Accepting the aforesaid agreement as you have done me the honor to state it, the conclusion still is not apparent that the Court itself has in fact made such a request for exclusion of visitors.

"(a) In your letter, no document containing such request is cited or quoted by you.

"(b) Such action by the Court would naturally be found in the Regulations adopted by the Court. But no such regulation there appears. In the 'Actes et Documents Relatifs à l'Organisation de la Cour', Series D, No. 2, 'Préparation du Règlement de la Cour' (Leyden, 1922), containing the record of the Court's deliberations upon their Regulations and the text of the Regulations as finally adopted at the 40th sitting, on March 24, 1922, the text shows no such rule. On the contrary, the implications are for publicity. Rule 31 provides: 'The Court shall sit in private to deliberate upon the decision of any case or on the reply to any question submitted to it.' Rule 64 provides: 'The judgment shall be regarded as taking effect on the day in which it is read in open Court.' The implications here are for publicity, except as otherwise specifically provided.

"(c) It is incredible that the Court itself could have decided to hold its hearings *regularly* in private. The Treaty provides (Art. 46) that 'The hearing in Court shall be public unless the Court shall decide otherwise'; and the Treaty's plain implication is that such decisions shall be exceptional and rare.

"4. May we not all join in firm acceptance of the fundamental principle that *Judicial proceedings must be open.* For a century past, that principle has been

established in the judicial traditions of Europe and America. I have visited many capitals of Europe; but I have heard of only two Supreme Courts which regularly exclude the respectable public from the hearings; one is the Supreme Court of Sweden, the other is the Sacra Romana Rota of the Papal Church. The Permanent Court of International Justice should not follow these exceptional examples. The Permanent Court will never command the public confidence which it deserves, if it holds secret hearings. More than any other Court in the world, this young but beneficent institution needs and is bound to offer its proceedings to the light of day.

"Let the Court-room even be packed full with eager hearers, if they are interested to come. Are the Directors apprehensive of the dignity of the Court? Are they afraid that some muddy feet will soil the marble pavements of the corridors? Do they regret to see some manual worker appearing informally in his rough garments of daily toil? These things are nothing in comparison to the cause of World Justice. If you can interest the peoples of the Earth visibly in the proceedings of that Court, and make it known to them as a real institution of Justice, you will do much to advance the great Cause for which it is founded. And, contrarily, by preserving about it even any shadow of secrecy, you will do much to retard its influence. And so I venture to intrude the advice: Take courage; throw open wide the doors of the Peace Palace *every day and every hour that the Court is in session.*

"I have the honor to be,
Very respectfully yours,
(Signed) JOHN H. WIGMORE."

PRIVATE COMPANIES

English and Canadian Method of Classifying Corporations as "Public" and "Private" Would Relieve Concerns Not Seeking Capital by Public Solicitation from Unnecessary Burdens and Still Afford the People All Needed Protection

By S. R. WRIGHTINGTON
Of the Boston, Massachusetts, Bar

THE modern law of corporations represents the most important attempt of our law to express the desires of business men for a simple yet flexible form of co-operative business organization in a system based on competition. Does it meet their requirements?

Modern private business asks from the law: (a) Limited liability; (b) transferable shares; (c) freedom from formality in operation; (d) privacy.

The partnership of a century ago possessed the last two but lacked the first two elements. The importance of limited liability was so great that it was inevitable that a substitute should be found. The corporation and the trust with transferable shares were employed for that purpose at about the same period, but the certainty afforded by legislation relating to corporations and familiarity with its use in larger quasi-public enterprises gave to the corporation an advantage, which, by the close of the last century, had made it the accepted vehicle of private business organization. It afforded satisfactory limited liability and free transferable shares of ownership. Its formalities, however, were so irksome as to be largely neglected except when under immediate guidance of counsel. When Sophocles, desiring to open an ice cream parlor, sits with his wife and daughter in the office of some legal compatriot and listens to the reading of "By-laws" and "Motions," he may be impressed by the majesty of the law as well as the importance of his enterprise to the public welfare, but a more sophisticated client may conclude that "the law is a hass."

How about privacy? At the very time the corporation was being adopted by private business the necessity of regulation of large corporations which threatened to dominate the state produced a crop of legislation applicable to all corporations which multiplied the formalities of operation and invaded privacy. To the increasing demands for public revenue corporations chartered by the state have been an easy mark. Complicated returns to different taxing jurisdictions have piled up the overhead of the enterprise. And all because the necessary control of the larger corporations was embodied in general laws applicable to the small and essentially private enterprises.

As a measure of relief many business men have turned to trusts with transferable shares and its sudden vogue has made it possible for irresponsible adventurers to abuse it in their operations for fleecing the public.

Dimly realizing that a real difference exists between a prosperous, self-contained business which can finance itself in private and enterprises of widely varying degrees of stability which seek capital by public solicitation, remedial legislation advanced by most modern publicity methods and engineered by dealers in legitimate securities has swept the state legislatures within a few years under the name of "Blue Sky Laws." The purpose and practical working of these laws have been generally applauded.

It must not be forgotten, however, that the system of affixing an official stamp of approval on shares to be offered to the public is not without its dangers. It will be difficult to free the minds of investors from a conviction that the state by its investigation and decision in some way stands sponsor for the enterprise. The administration of the Blue Sky Law in some states has been entrusted to a department other than that which deals with ordinary corporation organization. This means a second set of public officials to pass on the organization papers. There is the ever present danger that those at any time in control of existing centers of credit and commercial enterprise may have power enough over public officials to prevent the advent of new and independent competitors. A system of complete publicity regarding organizations with which the public is concerned, with information available to any investor or credit man, seems wiser in the long run than any plan of state control, however, beneficial and disinterested its present operation may be.

The courts of several states recently have had to apply the Blue Sky Laws in cases of sales of trust certificates issued by trusts with transferable shares. The legislature obviously had not contemplated this unfamiliar type of business organization. The prosecutions carried to the higher courts usually involved financial schemes that deserved repression and invited the exercise of the most modern impulse toward judicial legislation. The result has been some extraordinary examples of judicial agility which leave in doubt the usefulness of trusts with transferable shares in certain states. The one carefully reasoned recent opinion on this subject ends with a brief statement that the majority of the court do not agree with it and decide the case the other way.[1]

All this is symptomatic of a need of change. We have been attacking a real problem at the wrong end and without due consideration of the experience of others with different solutions. To hope for a lessening of legislation in the face of increasing complications of business relations seems impossible. It is probably inevitable that all business ultimately must conform to certain standards fixed by the law-makers, if only for the purpose of public revenue. A legislative statement of the law of trusts with transferable shares, such as has been attempted in Oklahoma, will soon grow to the complication of the law of corporations unless there is some clear recognition of a different field of usefulness.

The need of strict control of enterprises seeking capital by public solicitation is admitted. They cannot complain of formality of organization or publicity of operation, enforced by sufficient penalties. But that Jones, Smith and Robinson, or Jones alone, for that matter, desiring to manufacture leather with their own capital, but with limited liability, should have to comply with the venerable formalities of a town meeting and swear to certificates and returns of the most intimate and complicated character under penalties for negligent statement which rob the limitation of liability of much of its effectiveness, seems a wholly unnecessary burden on commerce.

England and Canada for years have met this problem successfully by classification of corporations.[2] The terms "public" and "private" companies in the Companies Act have a significance different from the use of the terms in the United States. Public companies are not merely public service corporations, but all companies of large numbers of stockholders or companies whose capital is obtained by public solicitation. All other companies are private companies. In 1921 in England out of 6,834 companies registered under the Companies Act of 1908, 6,293 were private companies.

The principal requirements which distinguish private from public companies under the Companies Act of 1908 are as follows: 1. Membership limited to fifty. 2. Transfer of shares restricted. 3. Public solicitation of capital forbidden.

A company with these stipulations in its articles may be formed by as few as two persons. No consents of the directors or list of directors need be filed. It is not bound by the rules as to allotment of shares requiring a certain minimum of initial paid up capital. It need not wait for a certificate of registration before starting business; it need not file a balance sheet with an annual list of shareholders and of issued capital, directors, mortgage and other registered debts; it need not file an annual report after the annual meeting; its debentures and preferred shareholders have no right to inspect its balance sheets and reports, as in the case of public companies. If public solicitation of capital or other relief from the restrictions imposed is desired later, provision is made by statute for change from private to public on compliance with certain requirements. The restriction on transfer of shares which is required is complied with by a stipulation requiring prior offer to the corporation or the directors like those common in closely held corporations in this country.

It is submitted that a similar classification of corporations and trusts with transferable shares is desirable in this country and that it would permit the limitation of the application of much legislation now burdening private business to what the English call Public Companies. Whether the organization permitted were in form a corporation or a trust is not important, but in making our classification we might well eliminate much useless formality in organization and operation as inappropriate to private business. A single individual should be permitted to form it without any requirement of a board of directors. Written statements signed by all stockholders or directors could be substituted for formal meetings provided the right to call meetings in case of disagreement were preserved. Officers could be elected to serve for an indefinite term. An accountant's return for taxation might well be the only annual return to the state or Federal government and any penalty for willful error should then be imposed on the accountant alone. In this way a reasonable measure of simplicity and flexibility would be possible without sacrifice of the other desires of business men or of any legitimate public interest.

1. State v. Cosgrove, 210 Pac. 393.

2. Since this article was written attention has been directed to the subject by President Cromwell of the New York Stock Exchange, who advocates the substitution of the English system for our present Blue Sky Laws.

The Press and the Administration of Justice

In view of the growing interest on the part not only of the press but also of the legal profession in the important question of the relation of the press to the administration of justice, it is worth noting that the subject is one which the Chicago Bar Association has had under consideration for a long while. Eight years ago the Board of Managers created a committee on relations of the press to judicial proceedings, and during the present year this committee has shown special activity. On February 28 Mr. Andrew R. Sherriff, Chairman of the committee, delivered an address before the Medill School of Journalism of Northwestern University, which was conspicuously reported by the press and published by a local firm of law printers in pamphlet form, as "a document of special interest to members of the professions of law and journalism." In the recent report of this committee to the President and Board of Managers of the Chicago Bar Association, the forthcoming discussion of this question at the meeting of the Conference of Bar Association Delegates at Philadelphia, the public conference on May 1 by the Association of the Bar of the City of New York, and English bills to regulate the matter recently introduced in Parliament, are mentioned as evidence of the widened interest in the problem. It states that the Chicago daily newspapers give marked evidence of being in sympathy with the movement and cites a recent striking instance illustrative of their willingness to cooperate.

REVIEW OF RECENT SUPREME COURT DECISIONS

Nebraska Standard-Weight Bread Law Held Unreasonable and Arbitrary—Employer's Liability Under Utah Workmen's Compensation Act — New York Women's Employment Statute Held Constitutional—District of Columbia Rent Regulation Act—Kansas Industrial Court Case—Deportation and Ex Post Facto Laws—Right to Carry on Trade Under Japanese Treaty of 1911—Patent Cases*

By Edgar Bronson Tolman

Standard-Weight Bread Law

The Nebraska statute requiring loaves of bread to be of certain standard weights and allowing a tolerance in excess thereof of no more than two ounces per pound determined upon the average weight of at least 25 loaves is an unreasonable and arbitrary regulation.

Jay Burns Bakery Co. et al. v. *Bryan.* Adv. Ops. 459, Sup. Ct. Rep.

The early regulations with regard to the weight of bread usually fixed a standard weight for bread, required each loaf to be labeled, and made it a crime to sell a loaf weighing less than the amount stated on the label. Such an ordinance was sustained in Schmidinger v. Chicago 226 U. S. 578. Since the war, bread weight regulations of a somewhat different type have come to be enacted. One such, the Nebraska standard-weight bread law, was held unconstitutional in this decision. This statute required all bread sold to be made in loaves weighing one-half pound, one pound, one and one-half pound, or exact multiples of one pound; it allowed a tolerance in excess of the prescribed weights of two ounces per pound and no more, such weight to be the average of not less than twenty-five loaves as determined on the premises where the bread is made within twenty-four hours after baking. Four large manufacturers of bread and one retail grocer brought suit to restrain the state authorities from enforcing this statute, invoking the due process clause to overturn the enactment. The state Supreme Court sustained the act, but on writ of error the Supreme Court of the United States reversed the judgment.

Mr. Justice Butler delivered the opinion of the Court. The evident purpose of the Act was to prevent loaves in excess of one standard weight from being sold for loaves of the next specified weight. But it appears that under not infrequent conditions of temperature and humidity evaporation from the bread would cause loaves to vary from prescribed tolerance, and that such variation could be prevented only by wrapping the bread in wax-paper or by altering the usual ingredients to retard evaporation. This was the circumstance which weighed with the Court. The learned Justice said in part:

> The act does not require bakers to select ingredients or to apply processes in the making of bread that will result in a product that will not vary in weight during 24 hours after baking as much as does bread properly made by the use of good wheat flour. As indicated by the opinion of the state Supreme Court, ingredients selected to lessen evaporation after baking would make an inferior and unsalable bread. It would be unreasonable to compel the making of such a product or to prevent making of good bread in order to comply with the provisions of the act fixing maximum weight. The act is not a sanitary measure. It does not relate to the preservation of bread in transportation or in the market, and it applies equally whether the bread is sold at the bakeries or is shipped to distant places for sale. Admittedly, the provision in question is concerned with weights only. The act does not regulate moisture content or require evaporation to be retarded by the wrapping of loaves or otherwise. The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food value. It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means.

In a long dissenting opinion of unusual interest and cogency, Mr. Justice Brandeis, with whom concurred Mr. Justice Holmes, urged the recent wide-spread application of bread weight laws such as this as evidence that the Nebraska regulation was not an unreasonable and arbitrary restriction. After pointing out that in providing for a tolerance, in taking the weight on the premises where the bread is baked, in not requiring a label, and in demanding the required weight for only twenty-four hours after baking, the statute was less stringent than the ordinance upheld in the *Schmidinger* case, the learned Justice considered the prohibition of excess weights. He said:

> This prohibition of excess weights is held to deny due process of law to bakers and sellers of bread. In plain English, the prohibition is declared to be a measure so arbitrary or whimsical that no body of legislators acting reasonably could have imposed it.

The learned Justice said:

> Why did legislators, bent on preventing short weights, prohibit, also, excessive weights? It was not from caprice or love of symmetry. It was because experience had taught consumers, honest dealers and public officials charged with the duty of enforcing laws concerning weights and measures that, if short weights were to be prevented, the prohibition of excessive weights was an administrative necessity. Similar experience had led to the enactment of a like prohibition of excess quantities in laws designed to prevent defrauding, by short measure, purchasers of many other articles.

He adduced a great number of examples of similar legislation. He made clear how a regulation very like the Nebraska statute but with a tolerance of only one ounce was enforced during the war under the Lever Act; and how twelve States had since enacted like legislation. His opinion is supported by copious annotations tending to show that such regulations are in daily practice aiding in the enforcement of the prohibition of

*The Patent cases in this issue were reviewed by Mr. Wallace R. Lane of the Chicago Bar.

short weights, and that they are approved by many authorities on weights and measures. In the face of widespread application and endorsement of such regulations, the learned Justice asked, could it be said that the legislature of Nebraska had no reason to believe that the excess weight provision would not unduly burden the business of making and selling bread? In conclusion he said:

> It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enhance our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.
>
> To decide, as a fact, that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.

The case was argued by Mr. Matthew A. Hall for the bakers and by Mr. Lloyd Dort for the state authorities.

Workmen's Compensation Acts

A workmen's compensation statute imposing liability upon the employer for accidents occurring in the course of employment which involve an abnormal exposure to a common peril, does not violate the Fourteenth Amendment.

Cudahy Packing Co. v. *Parramore*, Adv. Ops. 148, Sup. Ct. Rep. 153.

Upon writ of error the Supreme Court of the United States affirmed a judgment of the Supreme Court of Utah affirming an award made by the Utah Industrial Commission. The award was made to the dependents of an employee who was killed while riding to work in another's automobile. The only available route to his place of employment crossed three railroad tracks, and upon one of these the employee was struck and killed. The company's contention was that the accident occurred off the employer's premises and outside the hours of employment, and arose out of a peril to which the public generally was exposed, and that consequently liability was imposed arbitrarily and capriciously.

Mr. Justice Sutherland delivered the opinion of the Court. After stating that the applicability of the statute to this case was settled by the construction placed upon it by the state court, he considered the constitutional question. He said in part:

> The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rests the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions. . . . Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.

After reviewing the cases, he said:

> The basis of these decisions is that under the special facts of each case the employment itself involved peculiar and abnormal exposure to a common peril, which was annexed as a risk incident to an employment.
>
> Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so. And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected.

The case was argued by Mr. George T. Buckingham for the company and by Mr. J. Robert Robinson for the employee's dependents.

Workmen's Compensation Acts

A workmen's compensation law may require, on the death of an employee leaving no beneficiaries, the payment of money to a special fund to be expended as additional compensation to other employees suffering permanent total disability after permanent partial disability, and for vocational education.

R. E. Sheean Co. et al. v. *Shuler*, Adv. Ops. 567, Sup. Ct. Rep.

The New York Workmen's Compensation Law, previously held constitutional, is a compulsory compensation system applying to hazardous employments. Payment of compensation is guaranteed by an "insurance carrier," either a state insurance fund, an authorized mutual association, or, if financially responsible, the company itself. In 1922 the Act was amended so as to add the provisions here involved. These require the employer or other insurance carrier to pay, when an employee dies after injury leaving no beneficiaries, the sum of five hundred dollars to each of two funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disability; and the other for the rehabilitation of disabled employees through vocational training. Acting under these provisions, the State Industrial Board ordered an employer and an insurance carrier to pay two such sums. These awards were affirmed by successive state courts, and, on writ of error, the judgment was affirmed by the Supreme Court of the United States.

Mr. Justice Sanford delivered the opinion of the Court. After pointing out that such additional compensation was not unreasonable—an employee who loses one hand after having previously lost the other is obviously not compensated by payment for the loss of one hand—the learned Justice said:

> We do not think that the due process clause of the Fourteenth Amendment requires that such additional compensation to injured employees of the specified classes, should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created. In Mountain Timber Co. v. Washington, 243 U. S. 219, 244, it was held that a Workmen's Compensation Act did not deprive the employers of due process, because the compensation to the injured employees and their surviving dependents was not made by their immediate employers, but out of state funds to which the employers were required to make state contributions, based upon definite percentages of their payrolls, in different groups of industries classified according to hazard. On this

question the court said: "To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. . . ."

The case was argued by Mr. E. Clarence Aiken for the State authorities.

In *New York State Railways* v. *Shuler,* Adv. Ops. 570, Ct. Rep.—, a similar case arose under the Laws of 1920, whereby the employer was required to pay one hundred dollars to the total disability fund and nine hundred dollars to the rehabilitation fund. This different apportionment of the required sum the Court held did not produce a different result from that stated in the foregoing case.

Women's Employment Statutes

The New York statute prohibiting the night employment of women in restaurants in large cities does not deny due process or violate the equal protection clause.

Radice v. *State of New York,* Adv. Ops. 366, Sup. Ct. Rep. 325.

Invoking the due process and equal protection clauses of the Federal Constitution, an employer sought by writ of error to overturn his conviction in a New York state court of violating the New York statute prohibiting the employment of women in cities of the first and second class between 10 o'clock at night and six o'clock in the morning. Judgment was affirmed.

Mr. Justice Sutherland delivered the opinion of the Court. With regard to the objection based upon alleged interference with the liberty of two adult persons to contract, the learned Justice said in part:

> The loss of restful night's sleep can not be fully made up by sleep in the day time, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect for it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to find reasonable grounds for a contrary opinion, we are precluded from reviewing the legislative determination.

He held that the equal protection clause was not violated by the limitation of the restriction to cities of the first and second class, nor by the exclusion from its operation of hotel employees. He cited particularly decisions sustaining laws of labor for women in hotels but omitting women employees of boarding houses, and limiting the hours of labor for student nurses but excepting graduate nurses.

The case was argued by Mr. Henry W. Hill for the employer and by Messrs. Walter I. Hofheims and Irving I. Goldsmith for the state authorities.

Rent Regulation

Judicial knowledge recognizes that the circumstances have changed which produced the emergency justifying the Rent Regulation Act of the District of Columbia, and therefore the Court will ascertain the facts to determine whether the emergency has passed and the statute ceased to operate.

The Chastleton Corporation et al. v. *Sinclair et al.,* Adv. Ops. 477, Sup. Ct. Rep.

The original Rent Regulation Act of the District of Columbia was enacted in October, 1919, for a two-year period. Its provisions were twice continued by statutes reciting that the emergency continued. During the last continuance, the Rent Commission ordered reduction of the rents of a certain building. The owners brought suit to restrain the enforcement of the order on the ground the emergency had come to an end in 1922. The lower courts dismissed the bill. On appeal from the Court of Appeals of the District of Columbia, the Supreme Court reversed the judgment.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> "We repeat what was stated in Block v. Hirsh, 250 U. S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared (citing case). And still more obviously so far as this declaration looks to the future it can no more than prophesy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. . . .
>
> The order, although retrospective, was passed some time after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the Government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power. It is conceivable that, as shown in the affidavit attached to the bill, extensive activity in building has added to the ease of finding an abode. If about all that remains of war conditions is the increased cost of living that is not in itself a justification of the Act.

The determination of the necessary facts was left to the Supreme Court of the District with instructions to preserve the evidence for possible consideration by the Supreme Court of the United States.

Mr. Justice Brandeis, concurring in part, was of the opinion that the Court should not consider the constitutional question because the order of the Commission was not binding on the owners for the reason that notice was not served on them in accordance with the statute, but only on one whom the evidence showed not to be their agent.

Statutes,—The Kansas Industrial Court

In a case coming to the Supreme Court from state courts, the question of the severability of invalid portions of the Kansas Court of Industrial Relations Act will, in the absence of a controlling state decision, be left to the determination of the state court.

Dorchy v. *State of Kansas,* Adv. Ops. 369, Sup. Ct. Rep. 323.

In Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, the Kansas Court of Industrial Relations Act was held invalid as applied to packing plants. Before this decision was handed down, the Kansas Supreme Court affirmed a judgment convicting Dorchy for his action in calling a strike in a coal mine, of violating Section 19 of

the Act which makes it a felony for an official of a union to use his official position to influence another to violate the Act. After the decision in the Wolff case, the present case reached the Supreme Court by writ of error, and the question was thus presented whether or not Section 19 was so interwoven with the invalid provisions that it could not stand alone. The Court held that the question of severability should be determined by the State court, and to that end reversed the judgment.

Mr. Justice Brandeis delivered the opinion of the Court. After declaring that for the reasons set forth in the Wolff case the statute was also unconstitutional as applied to coal mines, he said:

> A statute bad in part is not necessarily void in it entirety. Provisions within the legislative power may stand if separable from the bad (citing cases). But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail. . . .
>
> The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court (citing cases). In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court (citing cases). In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case.

The case was argued by Messrs. John F. McCarron and Phil D. Callery for plaintiff in error, and by Messrs. John G. Egan and Chester I. Long for the State of Kansas.

Aliens,—Deportation

Deportation is not a punishment subject to the constitutional restriction against ex post facto laws.

The repeal of a statute under which an alien was convicted does not affect the right to deport him as an undesirable resident.

But a warrant for deportation under the Act of 1920 is invalid if it fails to include a finding that the alien is an undesirable resident.

Mahler et al. v. *Eby*, Adv. Ops. 331, Sup. Ct. Rep. 283.

Under the Congressional Act of May 10, 1920, provision was made for the deportation of certain additional classes of aliens, notably those convicted of violating various war statutes, "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." Five aliens were found guilty of violating the Selective Service Act and the Espionage Act, and were sentenced to the United States penitentiary. Pending imprisonment, the Secretary of Labor, after a hearing, issued warrants for their deportation. Upon writs of *habeas corpus* the validity of these warrants was challenged upon several grounds: that when the warrants were issued the statutes under which the aliens had been convicted had been repealed; that the Act of 1920 was an *ex post facto* law; and that there was no legal evidence that the aliens were deportable under the Act. The District Court for the Southern District of Illinois dismissed the writs and remanded the aliens for deportation. Upon appeal, the Supreme Court rejected appellants' constitutional objections, but held the warrants defective. According to Section 761, Revised Statutes, the Court therefore reversed the judgment with directions not to discharge the petitioners until the Secretary of Labor should have time to correct the finding upon the evidence, or to initiate another proceeding.

The CHIEF JUSTICE delivered the opinion of the Court. After stating the case, he said:

> The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments (citing case). The inhibition against the passage of an ex post facto law by Congress in Section 9 of Article One of the Constitution applies only to criminal laws (citing cases), and not to a deportation act like this (citing case). Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable citizens. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.

He continued:

> The brief for appellants insists that as the laws under which the appellants were convicted have been repealed, the fact of their conviction can not be made the basis for deportation. It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens. That record for such a purpose was not affected by the repeal of the laws which they had violated and under which they had suffered punishment. The repeal did not take the convicted persons out of the enumerated classes or take from the convictions any probative force rightly belonging to them.
>
> Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise it without congressional authority, Congress can not exercise it effectively save through the executive. It can not, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency (citing case). That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression "undesirable residents of the United States" is sufficiently definite to make the delegation quite within the power of Congress.

After distinguishing certain cases cited, the learned Chief Justice said:

> But it is said there was no evidence in the hearings of any of them as to their being undesirable residents of the United States. There were their convictions. Those were enough to justify the Secretary in finding that they were undesirable. The statute does not expressly require additional evidence. If it did, there was here the circumstance that after the examination of the petitioners had proceeded to a certain point of inquiry, the petitioners under the advice of counsel declined to answer further questions, an attitude from which the Secretary might well infer that what would be revealed by answers would not add to their desirability as residents. Of course the question how much additional evidence should be required must vary with the class which makes its members eligible for deportation. Alien enemies interned during war may be very good people and their having been interned may have little bearing on their being good material for residents or citizens when peace returns; but the aliens in this case were convicted of crimes under such

circumstances that the Secretary without more might find them undesirable as residents.

But the judgment was reversed because the warrants contained no express finding that the aliens were undesirable residents. This omission was regarded as jurisdictional. The learned Chief Justice applied the principle that an executive exercising delegated legislative power must substantially comply with all the statutory requirements in its exercise. This was a plain and serious defect of which the Court would take notice although not assigned as error in the *habeas corpus* proceedings.

The case was argued by Mr. Walter Nelles for the aliens and by Mr. George Rose Hull for the Federal authorities.

Aliens,—Deportation

Under the immigration law of 1921 alien wives and children of resident ministers of religion, subject to the quota law, may not be admitted after the quota is exhausted.

Commissioner of Immigration of the Port of New York v. *Gottlieb,* Adv. Ops. 588, Sup. Ct. Rep.—

In this decision the Supreme Court was driven to the conclusion that under the immigration laws in force in 1921 the alien wife and children of a minister living in the United States are not admissible if they come from countries subject to the quota law and if the quota is exhausted, but are admissible if they are natives of the Asiatic zone from which immigration is entirely barred.

The wife and infant son of a rabbi of a New York synagogue, natives of Palestine, were examined at Ellis Island and ordered deported on the ground that the applying quota was exhausted. Following *habeas corpus* proceedings, the District Court for the Southern District of New York held they were entitled to admission irrespective of the quota, and ordered them discharged. This judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. Its judgment was on writ of *certiorari* reversed by the Supreme Court.

Mr. Justice Sutherland delivered the opinion of the Court. Two statutes were involved. That of 1917 denied admission to many classes of undesirables, including natives of a certain described Asiatic zone, but excepted from this latter excluded class, among others, ministers and their wives and children. Section 2(d) of the Quota Law of 1921 granted admission beyond the quota to ministers, but said nothing as to wives and children of resident ministers. Another provision of this section directed that in the enforcement of the Act preference be given to families of certain classes of resident aliens. The two statutes were both in force, *in pari materia.* The learned Justice closely examined these acts, and then said:

> The respondents are not natives of the barred Asiatic zone and, therefore, are not entitled to admission under the exception in the Act of 1917. There is nothing in the later Act of 1921, as amended, which gives the wife or children of a minister any right of entry beyond that enjoyed by aliens generally, unless he falls within one of the classes specified in the proviso to Section 2(d), in which event they are to be given preference over other aliens within the limits of the quota. The quota having been exhausted, no case was presented calling for the application of the proviso, even if the respondents could otherwise have been brought within its terms. The contention that it is absurd and unreasonable to say that the wives and children of ministers from the barred Asiatic zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice. That aliens from one part of the world shall be admitted according to their status and those from another part according to fixed numerical proportions, is a matter wholly within the discretion of the lawmaking body, with which the courts have no authority to interfere.

The case was argued by Mr. George Ross Hull for the immigration authorities and by Mr. Louis Marshall for the immigrants.

In *Chung Fook* v. *White,* Adv. Ops. 403, Sup. Ct. Rep. 361, another remarkable inequality of the immigration law was demonstrated. Section 22 of the Immigration Act of February 5, 1917, requires the detention for hospital treatment of certain alien immigrants with contagious diseases, but then provides, "that if the person sending for wife or minor child is naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention . . . " Chung Fook, unfortunately for this situation, was not a naturalized citizen but a native-born citizen of the United States, and when he sent for his wife, a Chinese alien, she was detained at San Francisco because she had a contagious disease. His petition for *habeas corpus* was denied by the District Court, and this judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, and again by the Supreme Court. The Statute plainly accorded a preference to naturalized citizens beyond that enjoyed by native-born citizens. "The words of the statute being clear," said Mr. Justice Sutherland, "if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts."

In *United States ex rel. Tisi* v. *Tod,* Adv. Ops. 299, Sup. Ct. Rep. 260, it was held that denial of a fair hearing in deportation proceedings is not shown merely by proving that the decision was wrong. Catoni Tisi was ordered deported on the ground that knowingly he had had in his possession for distribution printed matter advocating the overthrow of the United States Government by force. Tisi had testified that he could not read English, in which language the literature was written, and that his presence with the leaflets was accidental. But the Supreme Court, by Mr. Justice Brandeis, in affirming the judgment of the District Court for the Southern District of New York dismissing a writ of *habeas corpus* and remanding petitioner for deportation, pointed out that there was other evidence from which Tisi's understanding of the leaflets could have been inferred. The hearing had been conducted fairly and with proper procedure. "The denial of a fair hearing," said the learned Justice, "is not established by proving merely that the decision was wrong (citing case). This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence."

In *United States ex rel. Mensevich* v. *Tod,* Adv. Ops. 301, Sup. Ct. Rep. 282, the Supreme Court affirmed a judgment of the District Court for the Southern District of New York dismissing a writ of *habeas corpus* and remanding Mensevich for deportation to Poland. Mensevich objected that he had come from the province of Grodno, that Grodno was a part of Russia when he emigrated, and that therefore he could be sent back only to Russia. But after the entry of the judgment below the United

States officially recognized the inclusion of Grodno (according to the Treaty of Riga) in Poland. Mr. Justice Brandeis said: "The validity of a detention questioned by a petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon. Deportation to Poland is now legal."

Aliens,—Japanese Treaty

The business of pawnbroking is a trade within the meaning of the Treaty with Japan of 1911, and hence a State may not deny to Japanese the right to carry on such trade.

Asakura v. *City of Seattle*, Adv. Ops. 577, Sup. Ct. Rep.—

For seventeen years R. Asakura, a subject of the Emperor of Japan, had resided in Seattle, and for six years he had carried on the business of pawnbroking in that city. In 1921 that city passed an ordinance denying the right to operate as a pawnbroker to those not citizens of the United States. Asakura brought suit to restrain the city authorities from enforcing the ordinance against him. He contended that the ordinance violated the 1911 treaty with Japan which provides that "the citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale or retail. . . ." The local court granted the relief prayed. On appeal the Supreme Court of the State held the ordinance valid and reversed the decree. On writ of error, the Supreme Court of the United States, sustaining Asakura, reversed the decree of the state Supreme Court.

Mr. Justice Butler delivered the opinion of the Court. Referring to the Treaty, he said:

> The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

After pointing out that although in form regulating pawnbroking, the ordinance in fact made it impossible for aliens to carry on the business, he considered the question whether the business of pawnbroker is "trade" within the meaning of the treaty. He said in part:

> Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. . . . The language of the treaty is comprehensive. The phrase "to carry on trade" is broad. That it is not to be given a restricted meaning is plain. The clauses "to . . . own or lease . . . shops, . . . to lease land . . . for . . . commercial purposes, and generally to do anything incident to or necessary for trade," and "shall receive . . . the most constant protection and security of their . . . property . . . " all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word "trade" as used in the treaty.
>
> By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business" . . . There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty.

Case argued by Mr. Dallas V. Halverstadt for Asakura and Mr. Charles F. Danworth for the city.

Patents.—Divisional Applications

A delay of several years in presenting claims after the original application was filed will avoid the amended claims for laches.

Webster Electric Company, Petitioner v. *Splitdorf Electrical Company*, Adv. Ops. 411, Sup. Ct. Rep. 343.

Plaintiff sued in equity for infringement of the Kane patent for a rigid unitary and integral support for mounting the various parts of an electrical ignition device. The Kane patent arose out of a divisional application. The original application was filed in 1910. In 1914 Kane endeavored to amend his application by introducing six claims copies from the Milton patent for the purpose of securing an interference. Plaintiff, Webster Company, acquired the rights of both Milton and Kane and conducted the proceedings for both sides in the Patent Office resulting in an award of priority in favor of Kane. Kane thereupon filed a divisional application presenting nine additional claims copied from Podlesaks patent, which claims were ultimately decided in favor of the Podlesaks. Thereafter Kane filed a new amendment embracing new and broader claims which were allowed upon an *ex parte* showing. The original bill was filed in 1915, and claims 7 and 8 were brought into the suit by a Supplemental Bill filed October 25, 1918.

Claims 7 and 8 were thus presented to the Patent Office for the first time by an amendment to a divisional application eight years and four months after the filing of the original application, and three years after the commencement of the present suit. During all of this time the subject matter of the claims was in general use and Kane and his assignee so far as claims 7 and 8 are concerned simply stood by and awaited developments. The trial court entered a decree for complainant which was reversed by the Circuit Court of Appeals for the Seventh Circuit, holding claims 7 and 8 void for *laches*. Upon Writ of Certiorari this was affirmed by the Supreme Court. Mr. Justice Sutherland delivered the opinion of the court. After recognizing the distinction between a case of a division of a single application for several independent inventions from the instant case of unreasonable delay on the part of applicant in bringing forward claims broader than those originally sought, the learned Justice said:

> The subject matter of these claims is not of such complicated character that it might not have been readily described in the original application or in one of the subsequent applications—in 1915, for example,—as it was described in 1918; and the long delay of Kane and his assignee in coming to the point tends strongly to confirm the view that the final determination to do so was an exigent afterthought, rather than a logical development of the original application. We have no hesitation in saying that the delay was unreasonable, and, under the circumstances shown by the record, constitutes laches, by which the petitioner lost whatever rights it might otherwise have been entitled to.

The opinion points out that it is the duty of the patentee to examine his letters patent within a reasonable time to ascertain whether the patent fully covered his invention.

Recognizing the analogy between patent reissue cases and divisional applications the court reaffirmed its holding that in cases involving *laches*, equitable estoppel or intervening private or public rights, the two-year limit provided in the statutes, for a time limit of filing applications, *prima facie*

(*Continued on page 518*)

STATE AND LOCAL BAR ASSOCIATION NOTES

THE STATE BAR ASSOCIATIONS OF ILLINOIS AND INDIANA held their annual conventions jointly this year, in the city of Terre Haute, Indiana, on May 27, 28 and 29. The plan was an innovation in these two associations, and was somewhat in the nature of an experiment. It created great interest on that account, and was successful in producing a very interesting and enthusiastic meeting.

The first day was devoted chiefly to registration and to the golf tournament, for which a number of prizes were offered by various legal publishing concerns and other individuals. That evening was devoted to an informal buffet supper in the ball room of the Hotel Deming, the convention headquarters, where the visiting lawyers and their ladies from the two states enjoyed some light entertainment and made the acquaintance of one another.

Wednesday, the 28th, was the big day of the joint meeting. In the morning the president of the Terre Haute Bar Association presided while the Indiana president, Judge James J. Moran of Portland, and the Illinois chief, Roger Sherman of Chicago, delivered their annual addresses. The afternoon was devoted to an address by Judge James H. Wilkerson of the Federal bench, concerning points of Federal practice, and varied by hearing the orations of the respective state winners of the National Constitution Oratorical Contest.

The ladies were entertained with a motor excursion about the city and its environs, a luncheon at the Fort Harrison Country Club, and a matinee party.

At the evening session the feature was the annual address, by the Honorable Robert V. Fletcher, of the Chicago Bar, former Justice of the Supreme Court of Mississippi and now General Solicitor for the Illinois Central Railroad Company, on the subject, "Solons Past and Present."

The third day of the meeting, Thursday, was given over to separate business sessions of the two Bar Associations. In the case of the Illinois Association this was little more than a routine proceeding this year, but interest was lent by the visit of the members of the Supreme Court of Indiana, who had been unable because of other engagements to attend sooner.

Much credit must be given for the enthusiastic and thorough-going manner in which the Terre Haute Bar Association, through its president, Henry Adamson, and its general chairman of arrangements, Charles E. Piety, played the host. The full and varied program was carried through without a halt, and Terre Haute set a high standard of hospitality for similar meetings in the future.

R. ALLAN STEPHENS,
Secretary, Illinois State Bar Association

THE WASHINGTON STATE BAR ASSOCIATION held its annual meeting at Spokane, on June 20 and 21. Hon. H. B. Kizer, President of the Spokane County Bar Association, delivered the address of welcome, to which the response was made by Hon. R. J. Venables, President of the Yakima County Bar Association. The President's address was delivered by Hon. S. J. Chadwick, of Seattle. The program included the following other addresses: "The Duty of the Schools in Training Children," H. W. Canfield, Spokane; "Appellate Procedure Through State and Federal Courts," Raymond W. Clifford, Olympia; "Admirality vs. Common Law Rights and Liabilities," Govnor Teats, Tacoma; "C. I. F. Contracts and the Pacific Ocean," F. G. T. Lucas, Vancouver, B. C.; "Greetings from the Oregon Bar Association," Fred W. Wilson, The Dalles, Oregon; "Administration of the Criminal Law," Elmer E. Todd, Seattle; 'The Functions and Duties of a State Board of Law Examiners," Howard M. Findley, Seattle.

THE KENTUCKY STATE BAR ASSOCIATION held its twenty-third annual meeting at Estill Springs, Kentucky, on Thursday and Friday, June 26 and 27. The address of welcome was delivered by Robert R. Friend of Irvine. The annual address of the meeting was delivered by Hon. R. E. L. Saner, President of the American Bar Association, Dallas, Texas, on the subject of "Back to Fundamentals." The program contained the following other addresses: President's Address, Judge John S. Hager, Ashland; "The Wilderness Trail in Kentucky, Its Genesis and Romance," H. C. Faulkner, Hazard; "Questions and Answers in the Daily Routine of the Office of the Clerk of the United States District Court," John W. Menzies, Covington; "Tax Exempt Securities," M. M. Logan, Bowling Green; "Some Great Lawyers of Kentucky," J. E. Robbins, Mayfield; "Interference by Congress With State Regulation of Railroads," Luthur M. Walter, Chicago.

THE EXECUTIVE COMMITTEE OF THE CALIFORNIA BAR ASSOCIATION, at a recent meeting, approved the tentative program for the 1924 convention presented by Secretary Thomas W. Robinson. The convention will be held at Catalina Island on September 11, 12 and 13. President Jeremiah F. Sullivan of San Francisco will deliver the presidential address. The reports of various important committees and discussion thereon will occupy a large part of the sessions. One of the most interesting of these is expected to be the report of the committee on a Self-Governing Bar, of which Joseph J. Webb is chairman. The Association has been conducting a campaign during the past few months in favor of this program. At the recent meeting the Executive Committee also adopted a resolution opposing Senate Bill 624, restricting the power of federal judges in the instruction of juries and authorizing President Sullivan to wire California's representatives to that effect.

THE KANSAS CITY BAR ASSOCIATION, through its Executive Committee, has recently entered a vigorous "protest against the passage of the Caraway bill or any similar bill which seeks to require instructions to jurors in federal courts to be in writing, or to deprive such courts of the right to comment on the credibility of witnesses and the weight of the evidence."

THE MISSISSIPPI STATE BAR ASSOCIATION held an interesting two days session at Jackson on May 6 and 7. Hon. J. N. Flowers of Jackson delivered an address of welcome for the Hinds County Bar, and Hon. W. A. Scott, Mayor of Jackson, one on behalf of that city. R. E. Wilburn of Meridian responded for the Association. The President's address was delivered by Hon. R. H. Thompson of Jackson. Miss Lucy R. Summerville of Cleveland delivered an address on "Laws for Lawyers." The annual address was delivered by Hon. R. E. L. Saner, president of the American Bar Association, on "Has America Outgrown the Constitution?" The convention was followed by the usual annual banquet.

AMERICAN BAR ASSOCIATION JOVRNAL

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PHILADELPHIA AND LONDON

Nothing is more deeply rooted in the human mind than the pilgrim spirit. For years men are nourished with great ideas and systems which they take as a matter of course. Then on a day, and often without particular reason as it seems, many of them feel rising within them an incurable longing to look on the early visible symbols and survivals of the great creations of the human spirit. They would see the very place where this or that began, where such a protagonist is laid in the last dreamless sleep, where conflict joined and the great idea emerged triumphant, where it had or has its temple, shrine or portico. No matter whether the place to be visited is humble or magnificent; the true pilgrim takes with him the reward of all his pilgrimage in the great thought he carries with him. The smallest shrine or the stateliest structure suffices to confirm it with the witness of the past, to give it historic and present reality, to touch the mind with awe, to fill with a wondering sense of the continuity of human effort, of which the present is the sum and yet a new starting point.

Certainly there is much of this spirit in the plans for the annual and special meeting of the American Bar Association this year. First there is to be a visit to two of the greatest shrines in all America: the place where independence was declared and later made secure by the work of the convention; and the spot where patriotism had its Gethsemane and came forth from the long agony to achieve its final victory. And hardly less concrete than the physical reminders of these great events will be, to the minds of the visitors, the figures of the great men who wrought these mighty works. The spot will make Franklin, Madison, James Wilson, Hamilton and the others seem for the moment to be living men; and Valley Forge, even more than Philadelphia itself, will lend the human touch to that majestic figure of the Father of his country which has been engraved imperishably on the mind and heart of Americans young and old. It will make him seem more real and, by reminding us of his struggles, will render his unfaltering will and his unconquerable hope even more inspiring:

> For this thy path across the trackless foam
> Of vehement action without scope or term,
> Called History, keeps a splendor; due to wit
> That found one clue to life and followed it.

It is hardly necessary to say that patriotism, with all that it implies of reverence for the past and dedication for the future, will be the great thought that will companion and lead the pilgrim to these shrines of our country. At almost every turn he will stand on holy ground. But another great idea, and yet one inseparably connected with the former, will give significance to the visit to the ancient home of the Common Law. It is not merely to a shrine of a profession that members of the American Bar Association will go on their trip to England; it will be to the shrines of a great system of law which, joined as it has been at every stage with the growth and the greatness of our country, all of them regard as one of the bulwarks of our American institutions and of the development of our national welfare. The ancient Inns of Court, with their traditions and methods of legal education so different from our own, and yet with their unmistakable evidences of kinship; the Houses of Parliament, where so much constitutional history was made; the Law Courts where the ancient common law is administered in some cases with methods much more modern than our own; Oxford and Cambridge; the documentary treasures illustrative of the legal history of England; the many spots in and about London associated with the lives of the great figures of the Common Law—all these will have their inspiration for men who come from a country that proudly boasts, above all other things, that it has "a government of laws and not of men." Nor should mention be omitted of the visit to Sulgrave Manor, the early home of the Washington family, that stands not only as a world memorial to his greatness but also a reminder of our kinship with those across the seas.

But the great thoughts that quicken the pilgrim spirit do not live in solitary splendor. They are companioned by a noble kindred. Thus not only should devotion to the great system of the Common Law, as that best suited

to our people and our country, be quickened by such a pilgrimage, but the companion thoughts of international good-will, of not forgotten kinship, of peace and concord, of cooperation in the daily work of the great world, of the joint treasures of our common speech, of the affinities of our great political ideas, should also be intensified. Looked at from this viewpoint, the visit of the American Bar Association to England will prove not only the most unique undertaking in the history of the profession but a lasting instrument of good. Those who go not only to England but also to Ireland, Scotland and France, in response to the cordial invitations of the lawyers of those countries, will be ambassadors of peace and good will among the nations whose influence will survive long after the visit has become an an ancient memory.

As for the programs for both of these great events in the life of the Association—the Philadelphia and the London special meetings—little remains to be said. They have been printed in previous issues of the JOURNAL and those who have read them will appreciate the successful results of the labors of the various committees. The addresses and recreational features at Philadelphia maintain the customary high standards of the Association, and those who attend will be more than repaid. As for the London program, it is principally an outline. No mention has been made of any of the speakers from either America or England, but it may be taken for granted that the selections will fully measure up the expectations. It has been suggested that the addresses to be made by English and American lawyers at the various functions should be embodied in permanent form as a memorial of an occasion which will assuredly be as important as it is enjoyable. That is a matter to be decided later, but it may be stated that it is at present under consideration.

UNIFORM INTERPRETATIONS OF CANONS OF ETHICS

Members of the Association have doubtless noted, from the publication of the opinions of the Committee on Professional Ethics and Grievances in the JOURNAL, that this committee has begun to avail itself of the added authority given it some time since. A wide field of usefulness has been opened to it. One of the particular advantages which, it is hoped, will result from the enlarged power of the Committee in respect to problems submitted from state and local bar associations, is a gradual unification of the interpretation of the canons of ethics by bar associations throughout the country. Writing on this point, in an article in the July, 1922, issue of the JOURNAL, Chairman Thomas Francis Howe of the Association's committee said:

"Most, if not all, of these local associations have adopted the Canons of Ethics of this Association, and many of the questions which their committees have to answer require that the canons be construed in order that the principles laid down therein may be applied to the question to be answered. Frequently the members of these committees differ as to the construction and application of the canons, and would be glad to avail themselves of some uniform interpretation. When such doubt exists there is at present no committee of this Association of whom they may request an opinion for their guidance, and thus enable them to make their answers uniform with that of similar committees of other associations. Lacking such, they may give an answer on an involved or complicated question that may appear at variance with that expressed on a similar question by the committee of some other association."

OUR NATIONAL GENIUS FOR WASTE

It may safely be assumed that American enterprise has left no opportunity for waste unexplored. The Post Office Department for some time has been calling attention to the remarkable exhibition of our national talents in this direction furnished by the large amount of insufficiently addressed mail that gets into the letter boxes.

Hundreds of thousands of dollars of the taxpayer's money are being spent every year in handling this sort of mail, just because the taxpayer won't take the trouble to address his letters properly. He cries with a loud voice in the market places for governmental economy and then compels the Post Office Department to spend large sums to repair the effects of his carelessness.

The Post Office Department is conducting a campaign to bring home to the public the national waste involved in the careless directing of mail. The number of letters that never get anywhere and the amount of money it costs to try to get them somewhere are astonishing; and the loss to individuals and to business men must certainly be very great. Here is a case where every individual, without bothering a legislature for a law, may do something to help the government and relieve the needless strain on a department. He ought to do it.

OPINIONS OF THE INTERNATIONAL COURTS

A Department in Which Will Be Reviewed Current Decisions of These Tribunals, With Special Attention to the Opinions of the Permanent Court of International Justice

By MANLEY O. HUDSON
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Arbitration Between Great Britain and Costa Rica—Responsibility of Costa Rica for Acts of the Tinoco Regime— Opinion and Award by William H. Taft, Sole Arbitrator[1]

The present Government of Costa Rica is a successor to the Tinoco Government in power from 1917 to 1919, and as successor cannot avoid responsibility for acts of that Government affecting British subjects; but the Costa Rican Law of Nullities of 1920 does not in fact work injury of which Great Britain can complain.

By a treaty which took effect on March 7, 1923, Great Britain and Costa Rica submitted to arbitration a difference as to the application of a Nullities Law of Costa Rica to an oil concession held by the Central Costa Rica Petroleum Co., Ltd., a "British corporation," and to an alleged debt owed by the Government of Costa Rica and the Banco Internacional of Costa Rica to the Royal Bank of Canada, which is also referred to as a "British corporation." Chief Justice Taft was later named sole arbitrator, empowered by the treaty to decide in accordance with "the principles of public and international law" whether the British demand is "well-founded," or whether on the contrary Costa Rica is justified in not recognizing the said claims and in maintaining the declaration of their nullity.

Both the concession and the debt in controversy depend on acts of the Tinoco Government, which was in power in Costa Rica from early 1917 until September, 1919. The Costa Rican Government, which is a party to the treaty of Arbitration represents the restoration of a government which was overthrown in January, 1917, when power was assumed by Tinoco, a former Secretary of War. An election was later held, and a new constitution established in June, 1917. Soon after Tinoco's retirement in August, 1919, his government fell and the old constitution was re-established and elections held under it.

On August 22, 1922, the Costa Rican Congress passed a Law of Nullities, invalidating all contracts between the executive power and private persons, made with or without legislative approval during the period of the Tinoco regime. The validity of this law was asserted by the Government of Costa Rica in its denial of liability for acts or obligations of the Tinoco Government, at the same time that the claims presented by the British Government were opposed on the merits. The Arbitrator was thus called upon to pass upon the law of state succession as it was applicable to the situation, and to examine the validity of the two claims in question if according to that law liability might exist. It was the first of these tasks which called forth a distinct contribution to international law.

The opinion and the award of Chief Justice Taft were handed down on October 18, 1923. It was first held that, in view of the fact that the Tinoco Government was "an actual sovereign Government" for a period of time, it must be conceded to have been "a link in the continuity for the Government of Costa Rica." The Arbitrator relied on the popular reception of Tinoco's Government at the time and on the actual and peaceable control which it exercised in the country. It had been urged by Costa Rica "that Great Britain is estopped by the fact that it did not recognize the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor." In reply, the Arbitrator admitted that "undoubtedly recognition by other Powers is an important eventual factor in establishing proof of the existence of a government in the society of nations." It was then pointed out that the Tinoco government was recognized by the governments of nineteen other countries and by the Vatican in 1917. This fact was not offset by the refusal of the United States to recognize Costa Rica, nor by the refusal of the Allied Powers to admit Costa Rica as a signatory to the Treaty of Versailles after the Tinoco Government's declaration of war against Germany. Chief Justice Taft declared:

> The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, can not outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standards set by International Law.

It had been insisted on behalf of Costa Rica that the Tinoco Government was not established in accordance with constitutional requirements and could not therefore be considered a *de facto* government. To this Chief Justice Taft replied:

> To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government can not establish a new government. This can not be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the

1. The opinion and award were first published in pamphlet form, and have now been re-published in 18 American Journal of International Law 147.

limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being.

The Arbitrator then held that Great Britain's failure to recognize the Tinoco government did not preclude the assertion of claims for obligations contracted by the Tinoco government. It is somewhat difficult to understand this part of the opinion. The answer seems to be that "the Executive of Great Britain" does now recognize that a *de facto* government did exist. Reliance is placed on the fact that "the failure to recognize the *de facto* government would not lead the succeeding government to change its position in any way on the faith of it." It is therefore concluded that

> Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith.

The Arbitrator then deals with a contention of Costa Rica that the claimants had contracted not to press their claims by way of the diplomatic intervention of their own government. Such undertakings by the claimants seem to have been established by Costa Rica, but the Arbitrator held that "these restrictions upon each claimant would seem to be inapplicable to a case like the present where is involved the obligation of a restored government for the acts or contract of a usurping government." In view of the legislation, "the restored government must be held to have waived the enforcement of any limitation upon the right of the Bank [Royal Bank] to invoke the protection of its Home Government under the circumstances."

The law of the case was thus largely decided against the contentions of the Costa Rican government. The Arbitrator then proceeded to examine the two claims on their merits. With respect to the claim of the Royal Bank of Canada, it was held that "the whole transaction here was full of irregularities." With the knowledge of the Bank, public credit was being pledged for private purposes. For instance, after the fall of the Tinoco Government, Tinoco's brother had been advanced a salary for four years in the future as Minister of Costa Rica to Italy. The claim of the Royal Bank therefore had to do with a transaction which involved no "legitimate governmental use" of public monies. And although the Royal Bank is subrogated to the benefits of the later transaction by the restored government, its claim otherwise was not upheld.

As to the concession, it was found that the Tinoco Government could have defeated the concession under the law of Costa Rica in existence at the time of its granting. Hence the restored government acted properly in the nullifying action.

The final award was that the Law of Nullities had not worked any injury of which Great Britain could complain, (a) as to the Royal Bank, after an assignment of a certain claim to which the Bank had been subrogated; and (b) as to the concession of the Central Costa Rica Petroleum Co., Ltd., because of its invalidity under the constitution of 1917.

With regard to the expenses of the arbitration it is notable that each party was left to pay its expenses. The Arbitrator himself very graciously contributed his services, saying that he accepted as full reward for any service he may have rendered, "the honor of being chosen to decide these important issues between the high contracting parties."

Opinion of the Mixed Claims Commission of the United States and Germany in War-Risk Insurance Premium Claims

Germany is not liable for the war-risk insurance premiums paid by American nationals for protection against acts which never occurred.

This opinion was handed down by Judge Edwin B. Parker, as umpire, on November 1, 1923, and the American and German commissioners concurred in its conclusions. The United States claimed reimbursement on behalf of American nationals for war-risk insurance premiums paid by such nationals for protection against stipulated hazards of war. It was not claimed that any property of such nationals had been seized or destroyed, and the premiums had been paid for protection against losses which never happened.

After an illuminating review of the difficulties experienced by the United States as a neutral in the war and of the measures taken to meet them, Judge Parker traces the history of war-risk insurance during this period and outlines the experience of the Bureau of War Risk Insurance of the Treasury Department of the United States. He takes cotton as a typical commodity of export, and concludes that "the war-risk insurance premiums and freights on raw cotton and cotton linters exported from the United States were *ultimately* paid (a) in the early days of the war by the *producer* in the decreased price received by him and (b) later by the *consumer* in the increased price paid by him." Thus the producers "were the real sufferers in the early days of the war."

Three claims are selected as typical—one on behalf of the United States Steel Products Co., one on behalf of the Costa Rica Union Mining Co., and one on behalf of the South Porto Rico Sugar Co., in which the premiums paid are "treated as losses to claimants not passed on by them." The test applied is, "Has an American national proven a loss suffered by him susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" By this test "the Commission has no hesitation in holding" that the claims do not "fall within the terms of the Treaty of Berlin." Judge Parker finds no more reason for the recovery of premiums than for the recovery of advances in ocean freight rates. Actual experience was taken to have shown that "in both theory and practice" the American nationals had "insured against the risks created by the acts of both groups" of belligerents, Britain and her Allies and Germany and her allies.

Reference is made to a similar holding by the Reparations Commission, though such holding is "in no wise binding on this tribunal"; and to the American failure to press claims for pensions and separation allowances. No basis for recovery of insurance premiums is to be found in the American-Prussian treaties of 1785, 1799, and 1828, on the "binding effect" of which no opinion is expressed.

German counsel had pressed for the application of the decisions of the Geneva Tribunal of 1872, and American counsel for the application of the decisions of the Court of Commissioners of Alabama Claims. But Judge Parker decides that so far as these decisions are in point, "they support the conclusions reached by this Commission." The refusal of the Geneva Tribunal to consider so-called "indirect claims" was embodied in a declaration which Judge Parker finds to have been

"in the light of the record, nothing more than an extra-judicial declaration made necessary by political expediency." The decisions of the Geneva Tribunal, "of doubtful value as precedents," are taken to hold "(1) that claims for war-risk premiums paid are not recoverable under the applicable principles of international law, and (2) that claims asserted by American underwriters for reimbursement of losses paid by them to American owners of property lost or damaged . . . are direct losses and recoverable as such." As to the distribution of the lump sum award paid by Great Britain to the United States, the fact that a portion was "paid to war-risk premium claimants can not be regarded as a controlling precedent in support of a like class of claims before this tribunal."

While Germany is obligated by the Treaty of Berlin "to make full and complete compensation for all losses sustained by American nationals proximately caused by Germany's acts," she cannot be held liable for "all losses incident to the very existence of a state of war," and "to this class belong claims by American nationals for refund of premiums paid by them for insurance against the risks of possible losses which never occurred, risks in their very nature uncertain, indefinite, indeterminable, and too remote to furnish a solid basis on which to rest a claim."

Administrative Decision No. 3 of the Mixed Claims Commission of the United States and Germany—Dealing with Germany's Liability for Interest and with the Measure of Damages for Property Taken

On December 11, 1923, Judge Edwin B. Parker, as umpire, acting with the concurrence of Mr. Chandler P. Anderson, the American Commissioner, and the partial concurrence of Dr. Wilhelm Kiesselbach, the German Commissioner, decided upon certain rules for the guidance of the respective Agents and their counsel. These rules relate to compensation in the nature of interest on claims on which Germany is liable under Administrative Decision No. I, and to the measure of damages in all claims for property taken.

No interest is to be allowed on claims "where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely," until the date when the "amount of the loss shall have been fixed by the Commission." This covers "claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work or honor." From the date of the Commission's award on such claims interest will be allowed at the rate of five per cent.

Interest will be allowed, however, "where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation," from the time when the actual loss occurred. This covers claims for "property losses." The Commission will not concern itself "with examining the quality of the acts causing" the property losses, since Germany is bound to pay compensation for all losses sustained. The measure of damages to be applied where property was taken and not returned to the owner during the period of neutrality is "the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place." To this will be added interest at five per cent from the date of the taking. The German Commissioner opposed this awarding of interest on the ground that it gave American nationals preference over the nationals of other Allied belligerent countries. This was admitted, but the difference was justified on the ground that different provision had been made for losses sustained during neutrality and for losses sustained during belligerency.

Similarly, with reference to property taken by Germany or her agents in German territory during the period of belligerency, the value of the property will be awarded with interest at five per cent from the date of the actual loss. As to property destroyed during the period of belligerency and not replaced, the claims falling in defined classes, and as to property taken by Germany or her allies outside German territory during this period, the value of the property will be awarded with interest at five per cent from November 11, 1918, the date set in the Treaty of Versailles.

It is recognized that other cases may present factors which the commission must consider with respect to the particular case. The awards made by German tribunals in cases based on property taken are also to be considered in assessing damages; but the weight to be given them will depend on the parties before the German tribunal, the extent and nature of the evidence developed and the nature of the award in each case.

United States of America on behalf of Eastern Steamship Lines, Inc., Claimant, v. Germany.—Before the Mixed Claims Commission of the United States and Germany

This claim is governed by the Opinion In War-Risk Insurance Premium Claims of November 1, 1923, and is dismissed for lack of proximate causation.

The "claimant," Eastern Steamship Lines, Inc., seeks to recover premiums paid for insurance on vessels operating along the New England coast, effected on account of a German submarine's attack on the *Perth Amboy*, off the Massachusetts coast, on July 21, 1918. "Claimant" had no interest in the *Perth Amboy*, but the attack on that vessel was alleged to be "the direct and proximate cause of this claimant's taking out insurance against war perils," and therefore "the legal connection between the threatened destruction and the insurance" was said to be "completely established." On this ground, American counsel contended that the case was not covered by the opinion in War-Risk Insurance Premium Claims, of November 1, 1923.

On March 11, 1924, Judge Edwin B. Parker, as umpire, gave the unanimous opinion of the Commission, dismissing the claim. While Germany's offensive operations off the Massachusetts coast created the fear which led the claimant to effect the insurance, the expense incurred was "simply incident to the existence of a state of war"; it was "incurred not to repair a loss caused by Germany's act but to provide against what claimant's president feared Germany might do." In fact, the fears were never realized.

A case is supposed of a claim by summer residents on the Massachusetts coast, moved through fear of attack by hostile submarines to insure their houses, or to lease them at lower rates. Such a case illustrates the far-reaching effect of the American contention. Such expenses would quite clearly be non-recoverable.

United States of America, on its own behalf and on behalf of certain of its nationals suffering losses at sea, v. Germany.—Before the Mixed Claims Commission of the United States and Germany

The extent of "naval and military works or materials" for the loss of which Germany is not liable is defined, and the exception is applied.

This opinion was handed down by Judge Edwin B. Parker, as umpire, on March 25, 1924, with the concurrence of Dr. Wilhelm Kiesselbach, the German commissioner, and the partial concurrence of Mr. Chandler P. Anderson, the American Commissioner. It deals with thirteen typical cases in which the United States, in some instances on its own behalf and in others on behalf of certain of its nationals, seeks compensation for "hull losses" suffered through the destruction of ships by Germany or her allies during the period of belligerency.

Germany's liability for property losses, by paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles, incorporated by reference into the Treaty of Berlin, does not extend to the loss of "naval and military works or materials." The question here decided is as to the application of that provision. "Were any or all of the thirteen hulls in question when destroyed 'naval and military works or materials' within the meaning of that phrase as used in that paragraph?"

It is emphasized that the Commission is not concerned with the legality of Germany's acts "as measured by rules of international law," and the Commission recognizes that some of Germany's financial obligations "would not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace." But the implications of this, as they effect the work of the Commission, are not spelled out.

The phrase "naval and military works or materials" has "no technical signification." The Reparation Commission's definition of it is to be considered "as an early *ex parte* construction" by the victorious European "Allies" who are the "principal beneficiaries." The reparation of "private losses sustained by the *civilian population*" had been uppermost in the minds of the draftsmen of the Treaty. As applied to the hulls in question, the phrase "relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies." It is recognized that it is difficult if not impossible to define the phrase so that the definition can be readily applied to the facts of every claim. But the true test is stated to be: "Was the ship when destroyed being operated by the United States directly in furtherance of a military operation against Germany or her allies?"

This necessitated a detailed examination of the status of the U. S. Shipping Board during the war and the nature of its control of American shipping. As a result, the Commission rejected the German contention that the Shipping Board's control of a vessel was presumptively in furtherance of military effort against Germany. There was not even a "rebuttable presumption." "So long as such vessels were performing the functions of merchant vessels, even though engaged in a service incident to the existence of a state of war, they will not fall within the "excepted class" for the loss of which Germany is not liable. But the assignment of vessels to the War Department or Navy Department by the Shipping Board is to be *"prima facie* but not conclusive evidence of their military or naval character."

Each of the thirteen cases is then analyzed and dealt with on its facts. Some were held to be within the exception and some without it. Legal title was held not to be controlling. "The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves. . . they became military materials."

Seven general rules are deduced by the Commission with respect to the tests to be applied in determining when hull losses fall within the excepted class of "naval and military works or materials." From these it appears immaterial whether the ship was owned by the United States; if privately operated for private profit it cannot be impressed with military character; defensive arming of a merchantman, even when the armament is manned by a naval gun crew and the vessel is routed by the Navy Department, does not impress with military character. The test above stated must be applied to the facts of each case—was the vessel at the time of her destruction operated by the United States directly in furtherance of a military operation against Germany or her allies?

As to one vessel, Mr. Anderson concluded in dissent that she was not so operated because at the time of her destruction she was returning in ballast from France, whither she had carried a cargo of gasoline and naphtha for the U. S. Army under the operation of the U. S. Army Transport Service.

Newspapers and Contempt of Court

"It is clear that it is a contempt of court to publish any matter in a newspaper, when proceedings are pending before the courts, which is likely to interfere with the due administration of the law. In Rex v. Parke (89 L. T. Rep. 439) it was pointed out that the reason why the publication of articles of this description was so treated was 'because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists-namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it.' The last words quoted are of great importance in considering the cases which were before the Lord Chief Justice, Mr. Justice Roche, and Mr. Justice Branson last week. 'Criminal investigation' by a newspaper with reference to a pending charge is, as Lord Hewart said, a perilous enterprise, and certain publications have advanced so far down this dangerous road, that it was of immediate necessity that the Crown should move in the matter. It cannot be disputed that in many directions the Press has assisted ably the cause of justice, but the modern tendency on the part of some newspapers to carry on an independent and amateur investigation into a crime for which a person is under arrest, demanded stern suppression. It is also a moot point, whether the publication with full details of the preliminary investigation before the justices, in the case of indictable offences not triable summarily, serves any useful purpose. In a few isolated instances it may result in the acquisition of evidence that was forthcoming owing to the publicity thus given, but in the great majority of the so-called sensational cases, the minds of jurymen must be influenced from the portions of the evidence they have already read in the newspapers."—*The Law Times*, May 31, 1924.

CURRENT LEGISLATION

The Immigration Act of 1924

By Middleton Beaman

WHATEVER may be the sins of omission and commission of the first session of the 68th Congress, it at least succeeded in agreeing upon what apparently is the permanent immigration law which has been promised for several years.

While retaining in all respects the list of excluded classes prescribed in the Immigration Act of 1917—a list composed of those undesirable by reason of physical or mental defects, or because of bad character or of the holding of doctrines contrary to American ideals—the new law makes permanent the temporary expedient laid down in the Act of 1921, namely, the principle of numerical limitation based upon the number of residents of the United States of similar nationality. Instead of the limitation of 3 per cent based upon the census of 1910, the new law makes the percentage 2 per cent, beginning July 1, 1924, and based it upon the census of 1890 until July 1, 1927, beginning at which time the total number of immigrants subject to the quota who may be admitted in any year is limited to 150,000, within which total quota the annual quota of each nationality is fixed at a number which bears the same ratio to 150,000 as the number of individuals resident in the United States in 1920 having that "national origin" bears to the total number of inhabitants of the United States in 1920. "National origin" is to be determined not by tracing the ancestors or descendants of a particular individual, but is to be based upon statistics of immigration and emigration, the rates of increase of population as shown by census figures, and such other data as the Secretary of State, the Secretary of Commerce, and the Secretary of Labor (who are to fix the quotas) may jointly find to be reliable. In determining the inhabitants in 1920, there are to be excluded from the count (1) immigrants from countries of Central and South America, and their descendants; (2) aliens ineligible to citizenship and their descendants; (3) descendants of slave immigrants; and (4) descendants of American aborigines. The quotas thus determined are to be reported to the President and proclaimed by him, and are to be final and conclusive, unless the three officials discover an error of fact. If for any reason the quotas proclaimed under the national origin system are not in effect for any fiscal year (either because the estimating officials have been unable to determine the quotas in time, or because the system is declared unconstitutional) quotas are to be determined on the basis of 2 per cent of the 1890 census.

The effect of these numerical limitations is to reduce the total annual quota from some 357,000 under the 1921 Act to less than 170,000 under the 2 per cent of the 1890 census plan, and to 150,000 under the national origin plan. Readers of the Journal will undoubtedly be more interested in the administrative features of the Act than in any statement of the effect of the law on the number who may come from any particular country.

The Act of 1921 provided for the exclusion from the United States of all aliens in excess of the quota, the count being made upon arrival in the United States, with all the resulting evils of racing of steamships and hardships caused by deportation of those honestly believing that they would arrive here before the quota was exhausted. The new law places no limitation upon the numbers which may be admitted, but provides that no immigrant may be admitted unless he has an "immigration visa" issued by a consular officer of the United States. The number of immigration visas which may be issued is limited to the quota prescribed for the nationality of the immigrant. Therefore, if the immigrant has obtained his immigration visa and arrives in the United States before the expiration of its validity (which is fixed at four months from the time of issuance) he is assured of entry if he is of the nationality he claimed to be and is otherwise admissible under the exclusion provisions of the 1917 Act.

The Act is sometimes referred to as selective immigration act. While it is not in any true sense selective, it at least takes a step looking toward that end by providing the machinery which in the future may make a system of selection possible. Each immigrant desiring an immigration visa must make written application under oath before the consular officer, giving full information about himself, and stating specifically, as to each of the classes excluded from admission, whether or not he is a member of such class. He must also furnish, if available, copies of his prison and military record, of his birth certificate, and of all other available public records concerning him kept by his government. The consular officer is prohibited from issuing the immigration visa if it appears to him from statements in the application or the accompanying papers that the immigrant is inadmissible to the United States, or if he knows or has reason to believe the immigrant is inadmissible. This provision makes it possible for the consular officers at least to weed out from the prospective immigrants those who will be certain of exclusion upon arrival in the United States, thus avoiding the hardships of the long voyage and subsequent deportation. No authority, however, is granted to the consular officers to select those whom they deem more desirable. The Act makes no change in the present system under which by Executive order visaed passports are required from nearly all countries. It is provided, however, that in cases where a visaed passport is required, the immigration visa will take the place of the visa on the passport.

In order to assist in the process of weeding out persons belonging to the excluded classes, and also for the purpose of assisting the Department of Labor in checking up applicants for naturalization, it is provided that immigrants belonging to the classes exempt from the quota must also obtain immigration visas, though without any limitation on the number which may be issued. Persons falling within this class (designated in the Act as "non-quota immigrants") are—

(1) Unmarried children under 18 years of age, and wives, of citizens of the United States resident in the United States;

(2) Immigrants lawfully admitted to the United States returning from a temporary visit abroad:

(3) Ministers of religious denominations, professors in colleges, academies, seminaries, or universities, and their wives, and their unmarried children under 18, if accompanying or following to join them;

(4) Bona fide students at least 15 years of age coming for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by them and approved by the Secretary of Labor; (but all such institutions of learning must agree to report to the Secretary of Labor the termination of attendance of each immigrant student, and if such reports are not made the approval of the institution is to be withdrawn;)

(5) Immigrants born in Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, or countries of Central or South America, and their wives, and their unmarried children under 18, if accompanying or following to join them.

This last class represents an important change from the Act of 1921, which exempts from the quota all aliens who had resided in the countries named for at least five years prior to their application for admission. The original Act of 1921 made the time one year. Before the expiration of the year so many aliens had come to these countries waiting admission that the time was changed to five years. The House bill of the new law made the period ten years, but the views of the Senate prevailed and the privilege is now allowed only to those born within the countries named.

Certain classes are declared not to be "immigrants" and hence are almost entirely excepted from the operation of the new law. These are (1) government officials and their family and staff, (2) tourists and travellers on business or pleasure, (3) aliens in transit through the United States, (4) bona fide seamen seeking to enter the United States temporarily in the pursuit of their calling, and (5) aliens entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a treaty of commerce and navigation in force on the date of the enactment of the Act. With several countries we have treaties of commerce and navigation providing for the right of the citizens and subjects of the two contracting parties to enter and carry on "trade, wholesale and retail". It was the view of both the House and Senate that such treaties permit the free entry of persons carrying on what might be termed international trade as distinct from more or less permanent residence to carry on trade in competition with local merchants.

Insistent demands were made upon Congress for inclusion in the Act of a method by which a demand for farm labor in this country might be met, but the only concession granted by Congress was to give preference within the quota to immigrants "skilled in agriculture" and their wives and dependent children under 16. The same preference is given to children between 18 and 21, fathers, mothers, and husbands, of citizens of the United States. Neither relatives nor farmers are to be given priority in the granting of preference, and the total preferences in the case of any nationality shall not exceed 50 per cent of the annual quota for such nationality. Just how these preferences can be granted under any workable system of administration is not clear.

The Act of 1921 limited the number admissible in any calendar month to 20 per cent of the total quota, with the result that the first five months of the fiscal year witnessed a rush for admission. The new law limits the number of immigration visas which may be issued to quota immigrants to 10 per centum of the quota in any month, thus spreading the admissions over the greater part of the year. (Provision is made that if the annual quota is less than 300, the number to be issued in any calendar month shall be prescribed by regulation.)

Great hardship was experienced under the 1921 Act in the case of children born while the parents were absent from their country of birth. Since under the act nationality is determined by country of birth, it often resulted that although the parents were admissible, the quota for the country in which the child was born was exhausted. The new law wisely provides that the nationality of a child under 21, accompanied by its alien parent shall be determined by the country of birth of the parent. Similarly, if the wife is of a different nationality from her accompanying husband, and the quota for her nationality is exhausted, she may be given an immigration visa as of the nationality of her husband.

The new law also removes the anomalous provision under the old law by which a person born in the United States who has lost his United States citizenship, was admitted exempt from the quota. It is provided that such an individual shall be considered as having been born in the country of which he is a citizen or subject.

Detailed provisions are made for the division of the world into the various geographical areas entitled to a quota. Colonies or dependencies, if separately enumerated in the census of 1890, are treated as separate countries. Other colonies and dependencies are thrown in with the quota of the mother country.

Authority is given to the administrative officers to provide by regulation for the admission without an immigration visa of aliens resident in the United States who depart temporarily. The law authorizes a resident alien desirous of making a temporary trip abroad to apply to the Department of Labor for a permit which, on his return, will establish the fact that he is returning from a temporary visit. It is believed that the regulations will provide that all such holders of permits will be relieved from the necessity of obtaining an immigration visa.

In order to avoid cases of hardship caused by ignorance on the part of the immigrant, it is provided that if the immigrant has obtained an immigration visa as of a certain nationality believing in good faith that he was of that nationality, or if he has obtained an immigration visa as a non-quota immigrant and honestly believed that he was a non-quota immigrant, and it appears upon arrival in the United States that he is of a different nationality or is a quota immigrant instead of a non-quota immigrant, the Secretary of Labor, if satisfied of his good faith, and that he could not, by reasonable diligence, have discovered the mistake before he left the last port outside the United States at which the vessel touched, may admit him and charge him to the quota of his proper nationality, if such quota is unexhausted and there remains time to reduce by one the number of immigration visas issuable to his nationality. It is believed that this provision, while making work for the administrative officers, will relieve many cases of hardship.

Section 23 of the Act provides that if an alien seeks to enter the United States, the burden of proof shall be upon him to establish that he is not subject to exclusion, and that in any deportation proceedings, the burden of proof shall be upon the alien to show

that he entered the United States lawfully, and the time, place, and manner of his entry, but he is to be entitled to the production of his immigration visa or other documents relating to such entry in the custody of the Department of Labor. This section, while creating anxiety in the minds of some, does not seem of much practical importance. If the immigration authorities in a deportation proceeding have held a hearing, and there is any evidence showing that the alien is deportable, the courts in habeas corpus proceedings will not interfere, with the result that in the absence of this section, the burden of proof would substantially be upon the alien. The principal value of the section in aiding the administration of the law is to cover the cases which occasionally occur, where the alien stands mute and refuses to disclose any facts.

The Act cures a number of the defects in the administrative provisions of the old immigration laws relating to alien seamen and fines in the case of steamship companies.

Included in the Act is the provision that has most caught the public attention, namely, the exclusion of aliens ineligible to citizenship, which becomes operative July 1, 1924. The following persons are exempt from the exclusion:

(1) Aliens lawfully admitted to the United States returning from a temporary visit abroad;

(2) Ministers of religious denominations, professors in colleges, academies, seminaries, and universities, and their wives and their unmarried children under 18, if accompanying or following to join them;

(3) Bona fide students at least 15 years of age, coming to study at an accredited school, college, academy, seminary, or university particularly designated by them and approved by the Secretary of Labor;

(4) Persons defined in the Act as non-immigrants, enumerated in an earlier portion of this article.

In view of the claim of discrimination against Japan, it should be noted that the provision applies not only to Japan but to numerous other countries. The term "ineligible to citizenship" applies to (1) those debarred from citizenship under section 2169 of the Revised Statutes, which excludes from naturalization all aliens who are not free white persons or persons of African nativity or descent, (2) persons deserting the Army in time of war, and (3) aliens who withdrew their declaration of intention in order to avoid the draft in the World War.

Having fixed for the future a permanent law of a highly restrictive character, Congress apparently in the last days of the session felt in a more generous mood, and on June 7th adopted a joint resolution for the relief of some 13,000 aliens otherwise subject to deportation.

This joint resolution permits to remain in the United States, if otherwise admissible under the immigration laws, the following classes of aliens who have been admitted in excess of the quota:

(1) Those admitted before June 7th in excess of the quota and charged to the quota of a later month. Some 2,800 aliens had been admitted under the practice whereby aliens arriving in excess of the quota for the month of arrival were admitted and charged to the quota for a later month. This brought forth protests from aliens arriving in the later month who became excess quota because of the consequent reduction in the quota for that month, and on December 11, 1923, it was decided by Judge Knox in the district court for the southern district of New York (in the Froimp-Consequently, these 2,800 aliens were held to be illegchuck case, not reported) that this practice was illegally admitted and were subject to deportation.

(2) Some 8,000 aliens were admitted under a construction of the law by the circuit court of appeals for the second circuit in the Gottlieb case, (285 Fid. 295), which case and cases following it, held that the wives and children of persons exempt from the quota were themselves exempt. On May 26th the Supreme Court handed down the decision in the case of Commissioner of Immigration v. Gottlieb, holding that the decision in the lawer court was erroneous, the result being that the aliens admitted under the decisions of the lower courts became subject to deportation. The joint resolution permits these aliens to remain, and also permits the entry of a thousand or more aliens who departed from their homes before the Supreme Court decision, believing in good faith that they would be admitted pursuant to the decision of the lower courts.

(3) During the past year, to relieve cases of great hardship, immigration authorities have admitted temporarily under bond, some few hundred aliens in excess of the quota. All those thus admitted prior to June 7th are to be permitted to remain.

The Common Law and the Idea of Progress

(Continued from page 464)

selves to this codified regulation. In fact, uniform laws in certain fields will weld the American people more and more into a unity, and certainly this was the purpose in giving to Congress power over interstate commerce.

But on the other hand, it may well be questioned whether a dead uniformity is after all desirable in other fields of the law due to the fact of varying circumstances and conditions in the various states. Moreover, through judicial interpretation and construction of these uniform codes, great variety and disparity of holdings have occurred. Courts are certain to read into codes and statutes the law in which they have been trained. But whatever one's viewpoint with respect to the wisdom of an extension of these attempts to bring about uniform legal programs, the fact nevertheless remains that they are efforts to bring progress into the law as an instrument for dealing with social relationships, for expediting the economic interests of a vast country and for welding into unity an ever-increasing population.

5. Conclusion

What legacy will the Idea of Progress leave the law? What perils to the race does this idea contain? Perhaps we are too near that which is transpiring to give adequate answers to these questions; proper perspective is lacking. That society and the human race will have gained in the struggle upward, in overcoming natural environment and living together more harmoniously, will likely be the judgment of posterity when the results of the idea of progress are finally evaluated. But whether this or that particular movement was itself progress in the sense herein used, may perhaps be questioned.

THE CURSE OF THE PERSONAL INJURY SUIT AND A REMEDY

Futility of Personal Injury Suit as Remedy for Those Killed or Injured in Legitimate Use of Public Streets—System of Liability Based on Fault Inadequate, Hazardous and Unjust—State Compensation Fund Plan on Model of Workmen's Compensation Acts Proposed*

By Hon. Robert S. Marx
Judge of Superior Court, Cincinnati, O.

IT is scarcely fifteen years ago since the enactment of the first workmen's compensation act, substituting compensation from a state insurance fund in place of a personal injury suit as the only remedy then available for the injured employe. When that proposal was first launched it met the excited opposition of the employers, of the liability insurance companies, of the lawyers for employers' liability insurance companies and for plaintiffs. The employers unjustly urged it would place an undue burden upon industry. The liability insurance companies justly urged that it would deprive them of a great deal of profitable business. The lawyers for the employers urged that it denied due process of law. The lawyers for the plaintiffs shed tears over the injured workmen who would be denied full and just compensation and be limited to the schedules of the compensation act. In 1911 the Court of Appeals of New York, in the then famous case of Ives vs. The South Buffalo Railroad Company held that the plan was unconstitutional and denounced the whole scheme as revolutionary; and, gentlemen, such has been the march of progress since 1911 that this then revolutionary scheme has become accepted as part of the just and human social and legal system of forty-two states of the Union, of Porto Rico and the territories of the United States, and has been applied by the Federal Government to over a million of its employes, and sixteen states of the Union today have state insurance funds operating successfully. I cite that fact to you because the first state compensation fund was enacted in 1911.

I have no doubt that all of the arguments then urged against workmen's compensation will be renewed with redoubled vigor against the proposal that I am advocating tonight. Yet, the march of progress since then has been so rapid that the once familiar defenses of the fellow servant and the assumption of risk already seem like archaic anachronisms in our modern age.

The proposal which I am advocating may be very tersely put. It is simply this: that we substitute for the personal injury suit as the only remedy now available to those who are injured or killed in the use of the streets, a state compensation fund to be created by compelling all vehicles, principally automobiles, to contribute a premium to such state fund as a condition of operation upon the streets, to compensate those who are injured and killed from that fund in a similar manner to the present workmen's compensation act.

I have come to this conclusion as a result of nearly ten years', more or less, active experience in the trial of personal injury suits and approximately four and a half years observation of the same as a trial judge; and that experience has convinced me of the utter futility of the personal injury suit as a remedy for those who are injured or killed in the legitimate use of our public streets.

Now, then, it is important that this fact be made clear, because I do not know whether you realize the extent to which the courts are today occupied with the trial of personal injury suits. With the ever increasing number of suits involving death and disaster, with the ever increasing number of vehicles of destruction on the streets, the time of the courts is continually taken up with the trial of these cases. In order to confirm our experience here, I wrote to Mr. Dustin, the assignment commissioner of the Cuyahoga County Courts, and in a letter received last week he tells me that seventy-five per cent of the actual trials in Cuyahoga County (Ohio) are personal injury cases. Therefore, we are dealing tonight with the principal problem which confronts the courts and the judges and the lawyers of our country who are engaged in the trial of cases. This experience has furthermore convinced me that the results in these personal injury suits bear no more relationship to any true rule of abstract justice, or to law, or to facts, than the winnings or losings of any gambler who participates in a pure game of chance.

The reasons for my advocacy of this proposal are very similar to those which led to the adoption of the workmen's compensation, and may be classified under three headings:

(1) The number of accidents in our streets today exceeds the number of accidents and deaths occasioned in our mills, factories, and workshops;

(2) The whole legal theory of liability predicated upon fault as a remedy for these deaths and disabling injuries, is incomplete, inadequate, impractical, unjust and uncertain;

(3) The risk of injury in the use of the streets is so great and so inevitable that it must be borne by society as a whole, and particularly by the transportation industry causing this death and injury, rather than by the individual victim of the automobile and other vehicle.

Let us examine these three propositions in their respective order. I am not at all sure whether you realize the change that has come about in recent years. Formerly when our streets were used only by horse-drawn vehicles, few in number and slow in operation, or by street cars confined to fixed rails and operated at definite, or sometimes indefinite, intervals, there was comparatively little dan-

*Address delivered before the Cincinnati Bar Association on April 18, 1924.

ger in the use of the streets; but that condition has been entirely changed, and the automobile has been introduced in ever increasing numbers, which has caused new dangers and has tremendously increased the toll of death and injury.

The Ohio figures are interesting: In 1919 we had 511,000 automobiles; in 1920, 600,000; in 1921, 700,000; in 1922, 958,000; last year, 1,060,000, and this year the estimate of the Secretary of State is 1,375,000.

In New York City alone there are 283,000 automobiles upon the streets daily. In Western Pennsylvania, the Western Pennsylvania Safety Council has just published figures showing that the mills, mines, and factories of Pittsburgh are safer than its streets, and that there were more men and women killed upon the streets of Pittsburgh than in all the mills and mines of Western Pennsylvania.

Professor Payne, of the Department of Sociology of New York University, estimated from official figures that a person traveling upon a railroad is to-day far safer than the ordinary person using the public streets.

The Metropolitan Life says that this is the foremost safety problem of the nation, and the National Safety Council says the safety of persons on the highway is the outstanding civic problem of the country to-day.

What are those fatalities? Why, gentlemen, when workmen's compensation was first proposed in 1908 there were only 393 people killed in that year by automobiles, and horse-drawn vehicles killed 1,924. When workmen's compensation was first enacted in 1911, there were only 2,061 persons killed upon the streets by vehicles, but last year there were 17,000 killed upon our public streets by the automobile alone. This is at the rate of more than 300 weekly—accountants like to figure these things—and four people injured every minute. The Automobile Legal Association reports there were 6,000 children under fifteen years of age killed upon the streets. I haven't any doubt of it. I have just cut out some of the articles from our local papers. Here is a little girl (yesterday's paper), Irene Walters, run down and killed by an automobile at Fourteenth and Vine, the 20th fatality since January 1st. Here is last night's Times-Star with a list of about sixteen accidents in one day, three or four of them involving skull fractures and one death.

The Metropolitan Life Insurance Company has published a table of all the different causes of mortality in America, showing that except as to cancer, in every case mortality is going down, but in the case of automobile accidents, they show a red line that is mounting straight up from 1911 to the present and indicating that all of the gains resulting from new methods of controlling diseases, are offset by the ever rising deaths from hazards on the public highways. The experience of the same company shows that 20% of all public accidents are due to transportation. Of these the street car causes 11%, and the automobile 59%. Their experience also shows that 42% of all public accidents are due to pedestrian use of the streets, of which 70% are caused by the automobile, 12% by the railroad, 8% by the street cars, 3% by other vehicles and 3% by falls.

Mr. Louis I. Dublin, Chairman of the Accidents Statistics Committee of the National Safety Council, reports that 25 people receive disabling injuries for every one who is killed and that since 17,000 are killed by the automobile annually, there are more than 425,000 who are injured by the automobile.

The claims for injury and death filed with the Ohio Workmen's Compensation Commission show that injuries occurring upon the public highways are more deadly than injuries occurring in industry. Last year there were 176,000 claims filed with the Commission for injuries to Ohio employees. Of this number, 121,000 were for injuries disabling the workmen for less than seven days and required medical care only. In 54,000 cases, compensation was granted for disabilities lasting longer than seven days. However, there were only 803 death claims arising from industrial accidents in Ohio.

I have cited these figures not only to show the appalling nature of the problem, but to show you that the figures of death which caused us to adopt workman's compensation,—which fifteen years ago were considered so great as to warrant taking this drastic step,—have already been exceeded by the figures of death and injury caused upon our public streets by automobiles.

There is a human side of the picture. I think every one of you is capable of painting that for yourselves. You realize, as well as I do, what it means to have so many dependent families created annually in our midst, to have four hundred or five hundred thousand persons injured more or less permanently.

The toll is mounting up. The social burden is increasing. There was an investigation made of just 196 married men in New York who were killed upon the public street. Ninety-three of their widows had to go to work. In nine families the children under sixteen entered industry, thirty-three were supported by charity, and ten were absolutely destitute.

Gentlemen, what is the remedy which the law offers to these people who are killed and injured in our public streets? The only answer to the cry of the men, women and children who are daily run down in the lawful use of the streets is the personal injury suit. The only answer of the law to-day to the stricken family of the killed workman, the only answer to the orphan child or the crippled wage earner is that we offer you this remedy: If you find the defendant, if you can prove ownership and agency, and if he is financially responsible, then the law gives you the hazardous possibility of recovery, if you can prove fault upon the part of the defendant, absence of fault upon the part of the plaintiff and no error intervenes.

I have no hesitancy in indicting the whole legal system of liability based upon fault as a remedy for people who are hurt or killed,—indicting it upon the grounds that it is inadequate, that it is incomplete, that it is hazardous, that it is unjust, and uncertain. More than that, it is worse than the old employer's liability suit, because, at least, under the employer's liability suit the employer was a known defendant; he usually was a solvent defendant; the witnesses were available, and were very often friendly workmen. But, let us take the present situation. In the first place, I think you will all agree that the personal injury suit is no remedy at all when the agent is the state, county or city. That perhaps was unimportant when the only vehicles operated by the municipalities were in the fire and police departments, but to-day your police force is

equipped with Fords, your road repair department, your water works department, practically every department of the city, county and state is motorized, and the number of deaths and injuries caused by these motorized vehicles engaged in public service is tremendous; and yet the people who are killed or injured have no remedy at all, under the recent decisions of our Supreme Court, if the driver is engaged in governmental work.

I think all of you know the doctrine was established in Fredericks vs. The City of Columbus in the 58 Ohio State, that the municipality was not liable. Under the chief justiceship of our honored fellow citizen, Judge Nichols, in the case of Faller vs. Cleveland in the 100 Ohio State, that doctrine was overruled, only to be reinstated by the present Supreme Court in Aldridge vs. Youngstown, in the 106 Ohio State, and recently reaffirmed in Akron vs. Butler, in the 108 Ohio State. So that we still have in Ohio the anomaly that the state which compels every person to grant a remedy for every wrong, grants no remedy for its own wrong. Of course, that antiquated doctrine and the injustice of it can be overcome by a change in that particular law, but that will not cure the other vices of the personal injury system.

I think you will all agree that the personal injury suit is no remedy if the owner is not found or agency not proved, or if he is execution proof. Of course, I am very well aware that the same generality can be applied to many law suits, but not to the same extent. In other law suits the individual makes his own contracts and his own contacts, but in these street accident cases a pedestrian is struck down by an on-rushing automobile, probably knocked unconscious or seriously injured, and often the automobile travels on, leaving behind only a trail of dust and a helpless victim. Of what avail to him is the personal injury suit? Yet, society has the burden of caring for him, or perhaps his family. Of what avail is the personal injury suit when the owner of the automobile is execution proof?

Our courts are full of judgments returned against defendants that are unsatisfied because the defendants have nothing. And these defendants, when they drive cars upon our streets, care nothing, because they have nothing. Even public taxicab companies have had judgments returned against them at the court house that are unsatisfied. There is scarcely a lawyer in this room who has not had cases brought to his office which he feels are worthless, although proof of negligence is clear, because the defendant is not financially responsible.

The average defendant who is financially responsible takes out liability insurance; and, practically speaking, those who are not financially responsible have no insurance. Therefore, it is interesting to know that practically only thirty per cent. of the automobiles traveling upon the highways are insured by liability companies, which means that from fifty to sixty per cent. are not financially good. Owing to the scheme of selling automobiles on time, the owner frequently has only an equity in the machine that he operates. These people, financially irresponsible, are nevertheless licensed to travel upon our streets, and the helpless victims that they leave behind have no recourse.

Let us assume, however, that the defendant is known, that the agency can be proved, that he is solvent. I still say that the personal injury suit is a slow, and inadequate and expensive remedy. When does a man, particularly a wage earner, need money after he is injured? He needs money at that time; he needs money to pay his doctor, to pay his rent, to buy food, because his wages have stopped. But when does he get it under the personal injury system? Well, it has been definitely calculated in Ohio that the average delay in cases where legal action is brought is two and one-half years. Now, that is the average. Some are tried more speedily and brought to a final judgment more speedily, and some, as all of you know, have taken as high as five to ten years to determine. The average delay has been calculated at two and a half years, and that delay is partially inherent in the system, because you have to wait until your client is out of the hospital, until he is able to see his witnesses, and to collect his facts, and then you have to file a suit. The pleadings are involved, the delays at the court house are involved, a trial must be had, perhaps a re-trial in the lower court, a review in one upper court, and perhaps more than one review, so that the delay, even in the speediest courts, is more or less inherent in the very system itself.

And what about the adequacy of the compensation? I am not going to dwell upon that, because, being lawyers, you are just as familiar with that as I am. There is no rule of compensation except the sound judgment of the jury. Very frequently compensation is inadequate,—sometimes compensation is excessive,—but whether the client gets too little or whether he gets too much, both the excessive and the inadequate damages are alike counts in the indictment against the system.

Investigations have been made taking into consideration settlements and suits, for example, in Allegheny County, Pennsylvania. Out of 355 married men killed in accidents, eighty-nine families received nothing, 113 families received $100 or less, sixty-one families between $100 and $500; and out of 228 injury cases, fifty-six per cent received nothing.

I can go on, because similar investigations have been made elsewhere, and were made in many cases prior to the adoption of the workmen's compensation act. I am speaking of the net return, because all of you know that every plaintiff who brings a successful suit in a personal injury case, must pay his lawyer, and the lawyer's fee usually runs between twenty-five and fifty per cent of the damages.

I quite fully realize that this particular vice of the personal injury system may seem a virtue to the legal profession, but I say that it is paradoxically cruel to prevent the jury, upon the one hand, from considering the lawyer's fee in estimating damages, and, on the other hand, to take twenty-five to fifty per cent out of the compensation which the man receives from the hands of the jury; and that is a necessary incident to the system itself.

But the plaintiff's attorney's fee is not the only expense of the system. The defendant also has to pay his attorney's fee, and, in addition, there are inevitable court costs that can not be included in the record costs, and there is the expense borne by the public involved in seventy-five per cent of the time of the courts and of the entire judicial machinery being taken up with the trial of these cases.

If you will stop to reason, if a system can be devised whereby the money saved in attorney's fees and court costs and other expenses can be paid into

a fund, you will have quite a considerable amount for equitable distribution to the victims who are the occasion of its expenditure.

There has been an interesting analysis made, if I may take the time to give it to you, of some fifty-eight cases brought last year under the open liability provisions of the Ohio Workmen's Compensation Act. As most of the lawyers know, at the present time you can not bring a suit against an employer who contributes to the fund, because the constitutional amendment effective January 1, 1924, prohibits it, but prior to that time you could in cases where there was a violation of a lawful requirement. Fifty-eight people took advantage of that provision and brought suits. Now, this is what happened to them: Their average recovery was $3,008. The plaintiff's attorney's fee was $1,053, average. The defendant's attorney's fee, $722. The net recovery of the injured man was $1,955, whereas, if he had filed his claim against the workmen's compensation fund in the beginning he would have gotten $2,820 on an average, and he would have gotten it promptly; and the average delay in these cases was two and a half years. And, then, in addition to that, out of the fifty-eight, twenty-seven and a half per cent lost their cases and got nothing.

There is a much stronger indictment in my mind of the personal injury system, and that is that fault is no longer a practical test of liability. What is your present system? Well, the plaintiff must prove, first, ownership and agency; second, that it was the defendant's fault; third, proximate cause; and, fourth, freedom from the slightest degree of fault upon his own part. The burden is upon the plaintiff as to the first three items in the bill of particulars. I know that it is axiomatic that the man who asserts a claim has the burden of proving it, but did it ever strike you how absurd it is to apply that rule to the man who was knocked unconscious by an on-rushing automobile, to the man who was seriously injured, or to the family of the man who was killed by the automobile, or to the families of these six thousand children who were killed last year?

Experience has taught me that the average person who is hit by an automobile does not know what hit him, much less who hit him. And yet he has the burden of proof, whereas, all of the opportunities for sustaining the burden are in the hands of the driver of the machine, who is seldom hurt, who immediately gets out and collects the witnesses, and who, if he is insured, turns the names over to the agents of the liability company, which maintains well equipped departments with expert claim agents, and usually the best lawyers in the city to prepare the defense to the claim which the injured man or his family can only make after he gets out of the hospital, or his body has been decently interred. So much for the burden of proof.

Let us take the question of fault itself. I agree that there was some semblance of reason to this doctrine when it was first announced, and when vehicles moved slowly and when they were few in number, and the whole incident could be parcelled out step by step. But did it ever occur to you what happens in the present day case? The average machine moves from twenty-five to thirty-five miles an hour. The lawful rate of speed in Ohio is now twenty-five miles an hour in our cities and thirty-five miles an hour outside of our cities. A machine going at that rate travels from forty-five to sixty-five feet a second, and when two automobiles collide, going in opposite directions, the whole thing occurs in a split second. And yet we solemnly enter the court room and endeavor by questions to witnesses to apportion fault, to ask about speed, distances traveled, horns blown, etc., to determine who was to blame. Of course, there are exceptional cases, glaring instances where the automobile went upon the sidewalk, where it was on the wrong side of the road, etc., but I am speaking of the average case, and the average case is the crossing case, because statistics show that sixty-five per cent of all accidents occur within a radius of fifty feet of street intersections; and in those average cases the whole test of who was at fault is perfectly ridiculous, if you will pardon that sweeping assertion. It does not depend nine times out of ten on who was at fault, but depends on who got the witnesses, who has the most witnesses, who has the best witnesses, whose witnesses can tell their story most convincingly or most coherently, and who has the best lawyer. It depends on the breaks of the trial, it depends on the bias of the judge or the jury, or a particular juror; it depends upon a thousand and one things that have no possible relationship to the question of fault. The truth is that the modern automobile accident happens too swiftly to make the test of fault a practicable test. I am not alone in that opinion, gentlemen, and although you may think many of the statements I have made are radical, you will find that they are pretty well backed up by authority. This whole subject was investigated in as conservative a state as Massachusetts by a commission, of which the attorney general was one, as long ago as 1921, and this is what they reported on that subject:

> It is entirely probable that in handling the subject of automobile accidents, undue weight has been given to negligence as a factor. Negligence undoubtedly is the most important element, but under traffic conditions in our larger cities, it is well nigh impossible for a person to exercise continuously the care which a reasonable man should exercise under the circumstances. However careful a person may be, either as a pedestrian or operator, the time will come when his attention is diverted, when his perceptions fail, and in that moment the accident occurs. Inasmuch as no person can at all times be in constant exercise of reasonable care without being more than human, it seems fair to attribute a not inconsiderable portion of the accidents as caused less by negligence than by the fact that the person is living in a condition of constant risk.

This is exactly the point that I am making, that the accident is an inevitable condition of modern transportation upon the streets and in many cases unrelated to this impossible issue of fault which we set up.

There is one other doctrine that I would like to touch upon, and that is the Ohio rule of contributory negligence, which is the majority rule. We not only say you must prove by a preponderance of the evidence that the defendant was at fault, but we say if the plaintiff's fault contributed directly in the slightest degree to his own injury, he can not recover. This is Chesrow vs. Bevier, 101 Ohio State, 282, if you want the reference. And there is hardly a negligence case that we try that a lawyer does not ask a charge based upon that case.

Did it ever strike you what an anti-social doctrine it is that says to the jury, if the defendant was ninety-nine per cent to blame, and the plaintiff was one per cent to blame, he can not recover a penny.

I know that contributory negligence has become a fetich in Ohio, that there are a lot of people who think it is something sacred. There is nothing sacred about the doctrine of contributory negligence. We had the doctrine of contributory negligence for many years in Illinois, and it was overruled. We had it in Kansas, and it was overruled. We had it in Georgia, where it still remains. In admiralty there is no such doctrine as contributory negligence, but you have the doctrine of apportioning the damages. Our own federal employers' liability act wipes contributory negligence off the books as a defense, and provides that the plaintiff's damages shall be diminished by his own negligence. You do not need to go outside of the state, for in 101 Ohio Laws our legislature provided that in suits by an employe against his employer, if the negligence of the employe was slight and the negligence of the employer was gross, the negligence of the employe should not be a defense, but the damages should be diminished. I might go on citing illustration after illustration where by legislation or by judicial decision the doctrine of contributory negligence has been diminished or done away with or overruled or abolished. It is not even unconstitutional under the Ives case to abolish the whole doctrine, but I am simply pointing out to you in our present personal injury system, we say to the jury, —and I do not want any misunderstanding about it; I will set aside any verdicts if the juries go contrary to the law as it is,—if the negligence of the plaintiff contributed in the slighest degree, he can not recover. It is a harsh and a cruel and anti-social doctrine that we as lawyers ought to abolish, because we know better than any one else the hardship of that rule.

Then, we have the other situation, where we have the inevitable accident due also to the risks of modern travel. The street is wet, the man in front stops suddenly, the man behind stops, your machine skids; nobody is at fault, there is no negligence, and no recovery, even where the defendant is financially responsible, etc.

I have cited these various illustrations to prove the second proposition that I started out to prove, namely, that the only remedy now available, that is, the personal injury suit, to the injured and killed is no remedy in many cases, is inadequate in other cases, is slow, expensive, wasteful and impracticable, and leaves the vast majority of those who are injured and killed to bear the burden of the injury, and bear it individually.

My proposition is to make the transportation industry bear the burden of the death and disaster caused by it. What is proposed? Simply this, that as a condition to the owner of an automobile or other vehicle securing a license to operate upon the streets, he be compelled to pay a premium into a state insurance fund just as the employer now pays a premium into the workmen's compensation fund; that in return for that premium he be given the protection the law now throws around the employer; and that out of that fund those who are injured shall be paid automatically and according to definite schedules, and a definite percentage of their earning power, a certain sum of money, and that they be granted immediately medical care, hospital care and nursing, just as the 121,000 Ohio workmen who were hurt were granted medical care last year, although no compensation. And it is proposed in case the breadwinner, the head of the family, or any member of the family is killed, that he shall receive a definite sum under the compensation act, which is now $6,500 in Ohio, automatically and as promptly as proof of claim can be filed. Now, that, in a nutshell, is all that I am proposing. It is not so radical as it may sound. It was radical in 1911 when first proposed as to workmen's compensation. It is not now.

I thought when I started in to prepare this subject that the idea was original and novel, and that I had sort of a generic patent, but the more I investigated the more I found out how different minds all over the country were working upon the same question. In New York in 1921 I found that the New York City Club, with as eminent an actuary as Miles M. Dawson as chairman of the committee, had prepared a report and a bill advocating in substance this same procedure. That bill was introduced in the present session of the New York legislature by as constructive a gentleman as Nathan Straus, Jr., of New York, and is entitled "An Act to Provide Compensation for Personal Injuries or Death Resulting from the Operation of Motor Vehicles," and for securing the payment of such compensation, and to require motor vehicle owners to be insured. It wipes out fault entirely, because the section relating to compensation reads, "Every owner shall provide compensation as required by this chapter according to the schedules of this chapter for disability or death of any person caused by an injury arising out of the operation of his motor vehicle, without regard to fault as a cause of injury, except where the injury is occasioned by the wilful intention of the injured person to bring about injury or death to himself or another."

Then I found in as conservative a state as Massachusetts, 'way back in 1920, they had appointed a commission to investigate this subject, and that commission, after investigation, recommended alternative legislation: that is, one bill providing for compensation and one bill providing for compulsory liability insurance. But I want to make it clear, as much as I dislike taking on two fights at one time, the principal thing I am advocating is compensation to the injured in place of liability as the basis of compensation, that is, insurance of compensation in place of the personal injury suit as a means of getting it; but, unfortunately, it is necessary that I also take a stand against liability insurance, because liability insurance is not a means of insuring compensation to the injured. It is a means of protection to the owner against paying compensation, and very frequently operates as a very effective medium for defeating compensation, because, as I have pointed out before, these companies are large, they are organized, they have excellent claim agents, and, as I happen to know, the most experienced, I would say, among the best lawyers of our local bar . . . So I think the bill recommended in Massachusetts, to compel every owner of an automobile to take out liability insurance, was very justly defeated.

And then they recommended, as an alternative, state compensation insurance, and in 1921 another commission was appointed, and, as a result of those discussions, there has been introduced into the Massachusetts legislature the bill by Mr. Armand C. Bang, entitled "An Act to Provide Indemnity to

Persons Injured in Motor Vehicle Accidents, and the Establishment of a State Automobile Fund." This Massachusetts act is so simple and so clear that I would like to take just a second to read two sections of it:

> Section 1. It shall be mandatory upon each and every owner of a motor vehicle, at the time of registration, to pay to the registrar of motor vehicles the amount or amounts hereinafter specified as his (or her or their) contribution, share or premium towards the state automobile fund hereby created for the purpose of indemnifying, to the extent herein provided, any person or persons, not hereinafter excluded, for bodily injuries, or death, suffered as the result of motor vehicle accidents in the State of Massachusetts.

Section 10 provides persons injured in motor vehicle accidents, or their dependents, shall be entitled to receive indemnity from the state fund whether the driver of the motor vehicle causing the accident or the injured person himself was at fault or not; whether the driver, or any other person, or the injured person himself, was negligent or not; whether the driver disobeyed any existing rule or not, and so on. It simply wipes out the whole doctrine of legalistic theory of liability based upon fault.

What are the objections to this proposed plan? Very briefly, the favorite objection of our profession is that it is unconstitutional. If the plan is made optional so as to leave it optional with the injured man to sue at law or to take compensation under the act, it clearly is not unconstitutional in Ohio under the decision of State v. Creamer, 85 Ohio State. I do not favor an optional law, but if the law was optional very few people would avail themselves of the option to file law suits, because the English experience has proved that only two per cent of injured workmen filed law suits when they had an option of getting compensation from the state fund. In Ohio last year there were 207 court claims under the open liability provision as against 176,000 compensation claims.

If the act is made exclusive, as I think it should be, as our present workmen's compensation act is, it probably will require a constitutional amendment, and if it does, in view of the fact that we amend the Ohio constitution almost every annual election, it simply means that the people will have to vote upon it, which is an advantage rather than a disadvantage.

The next argument is that it will increase the cost of operating vehicles. That is true in the case of the financially irresponsible motorist, but I am firmly convinced that such a man has no case before this court. No man ought to be allowed to operate a high power automobile upon our public streets, capable of inflicting death or disaster, when there is no means of indemnifying, either at law or otherwise, the person whom he may kill or injure. So I think it is a fair condition, to impose upon him this additional cost of paying a premum into a state fund.

As to those who carry private liability insurance. I think it is a very grave question whether the cost will be increased, or not. Personally I think it will not be, but I say that if it is, they at least will receive more complete protection because the present liability policy protects them usually up to $5,000 for injury to one person and $10,000 for injury growing out of one accident; whereas, the state fund would give them complete immunity from law suits. And, very frequently, as many of you know, in cases of serious injury, when a person runs into is a wealthier person than the average wage earner, the damage growing out of that accident exceeds the liability policy, and has often been known to completely bankrupt the owner of the the automobile. So that ,if there is an increased cost he at least gets consideration, but I doubt very much whether there will be an increased cost, and I will tell you why, and I know you will be interested in these figures in spite of the fact that they come at the end of the hour.

These figures are taken from the report of the Ohio Insurance Commissioner for the last year. It shows that there are ninety-eight companies doing a liability insurance business in Ohio,—that is an increase of eleven in the last year as against one company increase for all of the other insurance companies. The total income of these companies in 1922 was $486,000,000. That is an increase over 1921 of $18,000,000. Their income from Ohio alone was $24,000,000. That is an increase of $1,255,000. Out of the $486,000,000 collected throughout this nation the claimants got $184,00,000. The dividends were $23,000,000, that is, dividends to stockholders, an increase over 1921 of $14,000,000. Their surplus over all liabilities was $231,000,000, and as to policy holders their surplus was $329,000,000. These same companies collected for automobile liability $77,000,000, and they paid to claimants $28,000,000. In other words, nearly sixty-six per cent of the premiums collected from the owners of private automobiles went to pay overhead, management, expense, dividends to stockholders, investigation of claims and defense of law suits, and only about thirty-three per cent went to the victims of the accidents.

Now that is not an indictment of the companies, because, as I pointed out before, a man does not take out insurance in order to pay the people that he runs down. I am pointing that out to show that if the entire sum now paid by the owner of the automobile as a premium to the liability company for defeating compensation were paid to a state fund for the purpose of giving compensation, there would be ample money available without increasing the premium, and I base that statement on the fact that the cost of management, overhead, and profit to private companies runs, roughly speaking, sixty per cent of the total premium, and when the commission to the agent who writes the business is added, the percentage probably runs over that; whereas, the percentage for the administration of the state fund in Ohio at the present time is four per cent, as against sixty per cent overhead and commission on private liability insurance.

They have state funds in New York and Pennsylvania, and administrative costs run somewhat higher, about nine and one-tenth per cent; but, take it at its highest, twelve per cent is the cost of the administration of the state fund and the profit, commission, and cost of defeating claims, is eliminated; whereas, as I have previously said, about sixty per cent of your premium, when paid to private companies, goes for some other purpose than the payment of claims. . .

PHILADELPHIA AND SPECIAL LONDON MEETINGS

ONE of the features of the approaching meeting of the American Bar Association to be held in Philadelphia will be an exhibition in the Hall of the Historical Society of Pennsylvania in the afternoon of July 9th of Books, Manuscripts, Autograph Letters and Portraits collected by Hampton L. Carson during the past forty years, illustrating the growth of Anglo-Saxon Law from the days of Alfred the Great to those of Sir William Blackstone, inclusive.

As a collection made by a single individual it stands in its entirety without a rival on either side of the Atlantic. It comprises about eight thousand printed books and pamphlets, and about twelve thousand pictures and autograph letters, representing not only engravings from authentic portraits of Judges and Lawyers, but pictures of trials, punishments, executions, Newgate Calendars, prison scenes, and engraved pictures of the Inns of Court. These are sustained by Letters and Documents in the handwriting of celebrated judges and advocates, and also by legal manuscripts before the days of printing.

There will be exhibited original editions of legal classical treatises, such as Glanville, Bracton, Britton, Fleta, Fortescue's *De Laudibus Legum Angliae*, Littleton, Coke, Hale and Blackstone, and specimens of the Year Books from the reign of Edward I to that of Henry VIII, the Digests and Abridgments, such as Statham, Fitzherbert, and Brooke of the Tudor Period, of the Reports from Elizabethan days to those of George III, and of the Statutes, in the aggregate covering a period from the close of the Fifteenth century to the close of the Eighteenth century.

It is of necessity impossible to exhibit the collection in mass. Its comprehensiveness, its bulk, and its details forbid such an attempt. Mr. Carson will select specimens representative of the Saxon Period, the Norman Period, the Anglo-Norman Period, the Period of the Year Books, and of the Ages of Glanville, Bracton, Littleton, Coke, Hale and Blackstone, most suitable to impress upon the eye the characteristics of each period.

Thus there will be shown the *Laws of the Anglo-Saxons*, of Alfred the Great and Edward the Confessor; of *Domes Day Book*, of William the Norman; a Fourteenth Century Manuscript of *Magna Charta* of King John; a manuscript of the reign of Edward I, and later Plantagenet Kings; the earliest of Printed Law books (two of them *incunabula*), the Year Books and Early English Reports; the Manuscript opinions of the Twelve Judges and Arguments of Counsel in John Hampden's Ship Money case; the copy of Rolle's Abridgment owned by Sir Matthew Hale; the First English Edition of Blackstone's Commentaries; the First American Edition of the Commentaries published in Philadelphia prior to the American Revolution; the Original of Blackstone's Commission as a Judge of the Court of Common Pleas, under the great Seal; Blackstone's Patent of Precedence at the Bar; a summons to attend a meeting of the Privy Council addressed to Blackstone; a part of his notes in his own handwriting for a chapter in the Third Volume of the Commentaries attested by his son.

There will be also pictures of the Inns of Court, so that those who have never visited them, may become familiar in advance with scenes in London visited for the first time.

A catalogue of the Exhibit, for the use of visitors, will be distributed at the Hall of the Historical Society, and may be preserved as an interesting souvenir.

Revised Program for Annual Meeting

Tuesday Morning, July 8th, at 10:00 O'clock

President Robert E. Lee Saner, of Dallas, Texas, will preside.

Address of Welcome, by Hon. W. Freeland Kendrick, Mayor of Philadelphia.

Response, Hon. Chester I. Long, Wichita.

Announcements:

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Nomination and election of members.

Address by President of the Association, Hon. Hampton L. Carson presiding.

Meeting of State Delegations for nomination of General Council and Vice-President and Local Council for each State.

Tuesday Afternoon, July 8th, at 2:30 o'clock

This will be a joint session of the American Bar Association and the Pennsylvania Bar Association. Richard E. Cochran, President of the Pennsylvania Bar Association, will preside.

Addresses to be announced later.

Reception and tea by Philadelphia Bar at Historical Society of Penn., 1300 Locust St., and exhibit of Hampton L. Carson's collection of Blackstoniana and other books and prints.

Tuesday Evening, July 8th, at 8:00 o'clock

(President Saner presiding)

Address by Attorney General Harlan F. Stone, "Progress in Law Improvement in the U. S."

Address by Roscoe Pound on "Some Parallels From Legal History."

9:30 p. m. President's Reception—Rose Gardens, Bellevue-Stratford Hotel.

Wednesday Morning, July 9th, at 10:00 o'clock

(Hon. John W. Davis presiding.)

10:00 a. m. Statement of progress of work of the American Law Institute, by the Director, William Draper Lewis.

Reports of Sections and Committees. The names of Chairman are given below:

10:20 a. m. Committee on Classification and Restatement of the Law, Thomas I. Parkinson, New York City.

SECTIONS

10:30 a. m. Criminal Law, Oscar Hallam, St. Paul, Minn.

10:35 a. m. Comparative Law Bureau, William M. Smithers, Philadelphia, Pa.

10:40 a. m. Judicial Section, Pierce Butler, Washington, D. C.

10:50 a. m. Legal Education, Silas H. Strawn, Chicago, Ill.

11:00 a. m. Patent, Trademark & Copyright Law, Otto R. Barnett, Chicago, Ill.

11:10 a. m. National Conference of Commissioners on Uniform State Laws, Nathan William MacChesney, Chicago, Ill.
11:20 a. m. Public Utility Law, Chester I. Long, Wichita, Kansas.
11:30 a. m. Conference of Bar Association Delegates, W. H. H. Piatt, Kansas City, Mo.

COMMITTEES

11:40 a. m. Professional Ethics and Grievances, Thomas Francis Howe, Chicago, Ill.
11:50 a. m. Commerce, Trade and Commercial Law, W. H. H. Piatt, Kansas City, Mo.
12:00 Noon. Practice in Bankruptcy Matters, Henry Deutsch, Minneapolis, Minn.
12:10 p. m. Use of Word "Attorney," William H. Lamar, Washington, D. C.
12:20 p. m. Publicity, Frederick A. Brown, Chicago, Ill.
12:30 p. m. Publications, George T. Page, Chicago, Ill.
12:40 p. m. Memorials, W. Thomas Kemp, Baltimore, Md.
12:50 p. m. Membership, Frederick E. Wadhams, Albany, N. Y.
1:00 p. m. Adjournment.

Wednesday Afternoon, July 9th, at 2:00 o'clock

(Hon. C. A. Severance presiding.)

Committee Reports. The names of Chairmen are given below:

2:00 p. m. International Law, James Brown Scott, Washington, D. C.
2:15 . m. Law Enforcement, Charles S. Whitman, New York City.
2:30 p. m. American Citizenship, R. E. L. Saner, Dallas, Texas. (Report will be presented by F. Dumont Smith, Hutchinson, Kans, for the Committee.)
3:00 p. m. Judicial Ethics, William Howard Taft, Washington, D. C.
3:30 p. m. Jurisprudence and Law Reform, Everett P. Wheeler, New York City.
3:45 p. m. Increase of Judicial Salaries, A. B. Andrews, Raleigh, N. C.

Wednesday Evening July 9th, at 8:00 o'clock

(President Saner presiding.)

Address by James Hamilton Lewis, "Our New Era in International Government."

Thursday Morning, July 10th, at 10:00 o'clock

(Hon. J. M. Dickinson presiding.)

Committee Reports. The names of Chairmen are given below:

10:00 a. m. Federal Taxation, Charles Henry Butler, Washington, D. C.
10:20 a. m. Revision of Federal Statutes, Paul H. Gaither, Greensburg, Pa.
10:30 a. m. Uniform Judicial Procedure, Thomas W. Shelton, Norfolk, Va.
10:40 a. m. Noteworthy Changes in Statute Law, Joseph P. Chamberlain, New York City.
10:50 a. m. Admiralty and Maritime Law, Charles C. Burlingham, New York City.
11:00 a. m. Change of Date of Presidential Inauguration, William L. Putnam, Boston, Mass.
11:10 a. m. Legal Aid, Reginald Heber Smith, Boston, Mass.
11:20 a. m. Law of Aeronautics, William P. McCracken, Chicago, Ill.
11:30 a. m. Incorporation of American Bar Association, John B. Corliss, Detroit, Michigan.
11:40 a. m. Insurance Law, William H. Burges, El Paso, Texas.
11:50 a. m. Removal of Government Liens on Real Estate, John T. Richards, Chicago, Ill.
12:00 Noon. Nomination and Election of Officers.
Miscellaneous Business.
Adjournment Sine Die.

Thursday Afternon, July 10th, at 2:00 o'clock

Delaware River Trip.

Thursday Evening July 10th, at 7:00 o'clock

Annual Dinner of Association, Bellevue-Stratford Hotel. Speakers to be announced later.
Dinner to Ladies, Bellevue-Stratford Hotel.

Friday, July 11th

Pilgrimage to Valley Forge.

Special London Meeting

THE following pertinent information as to arrangements in London is contained in a letter from Mr. J. L. Crouch, Honorary Secretary of the English committee:

"In addition to the functions which have been arranged by the Reception Committee and which may therefore be entitled "official" to which all members of the A. B. A. will be invited, others are included in the programme which are to be given by private hosts.

"Special reference is desired to be made to the latter.

"It would have given such hosts immense pleasure to have invited all the visitors. In some cases, however, limitations of accommodation preclude them from so doing. They have asked the Reception Committee at the earliest opportunity that occurs to express their deep regret and to say how much they trust that the visitors who do not receive invitations will appreciate the reason for it, and will make all due allowances.

"Perhaps one example will afford an illustration.

"The Lord Mayor of London hopes to be honored by the presence of 550 members of the A. B. A. at a reception and banquet in the Guildhall. He would have been still more honoured had it been possible to receive all members. The fact is, however, that the utmost seating capacity of the Guildhall is limited to 850 persons. On this occasion the company will be completed by the presence of 100 members of the City Corporation; 100 members of the Canadian Bar Association, and 100 English lawyers.

"In all such cases it will be necessary to have recourse to a ballot. It may happen that recipients of invitations may desire to exchange them for others. To meet this possible eventuality there will be established in the Bureau at the Hotel Cecil a department to facilitate and arrange such exchange. It will be called "Exchange" and further particulars and directions will be handed to each visitor on arrival.

"All arrangements have been completed for the establishment of the following departments in the bureau at the Hotel Cecil, namely, 'Travel', which will supply all information relative thereto; 'Press Representative', where the Press will be able to obtain information and arrange interviews and so on; 'Guides', from which arrangements will be directed for tours round the Courts, the Old Bailey, the Record Office, Inns of Court, and other places if and as desired; 'Enquiries'; 'Typewriting'; 'Duplicating'; 'Printing'; 'Reporters', besides the 'Postal' which are all self explanatory, and 'Exchange'."

Visit of American Bar Association to Sulgrave Manor, July 25

Arrangements are now sufficiently far advanced to allow a preliminary statement to be made as to the programme of the projected visit of 500 members of the American Bar Association to Sulgrave Manor, the old English home of the Washingtons, on July 25th, as the guests of Sir Charles Wakefield and the Sulgrave Institution of Great Britain, according to advices from the other side.

Accompanied by about 100 of their English hosts, including Governors of the Sulgrave Institution, the party will leave Euston Station at 9 a. m. by special train to Northampton. On arrival at Northampton they will be met at the station by a fleet of covered motor buses which will convey them first to the Guildhall, Northampton, over which Lawrence Washington, the builder of Sulgrave Manor, presided twice as Mayor of the City nearly four hundred years ago, in the reign of King Henry VIII.

After a few words of welcome here by the authorities of the city and county, the party will drive to Althorp, the historic home of the Spencer family, who were connected with the Washingtons by marriage. The time to be spent here, one hour, will be all too short for anything but a rapid view of the many art treasure of this historic house.

Earl Spencer, however, who is a Governor of the Sulgrave Institution, has very cordially invited the visitors to go through the famous picture galleries at Althorp, and to see the Washington relics belonging to this family exhibited.

From Althorp the visitors will drive direct to Sulgrave Manor, where luncheon will be served to the six hundred guests in a marquee in the grounds. Here some brief addresses will be given and an opportunity will be afforded to as many as possible to look through the rooms of the historic Manor House, which was the home of the Washington family from 1539-1610, i. e. through the Elizabethan age and the life of Shakespeare.

Leaving Sulgrave after a two hours stay, the party will then drive through Banbury to Broughton Castle which Lord Saye and Sele has asked them to visit. Broughton Castle is a famous and beautiful Jacobean mansion with many interesting associations with the Civil War period of English history. The family of Lord Saye and Sele has historic connections with America in the Colonial period and the town of Saybrook, lying between New York and Boston was named after the Lord Saye and Sele, and the Lord Brook of the period of Charles I.

After spending an hour at Broughton Castle the party will drive to Banbury Station where the special train will await them and take them back to London where they should arrive by about 6:45 p. m.

In planning the above day's tour for the distinguished American visitors, Sir Charles Wakefield and the Sulgrave Institution of Great Britain desire that they should have an opportunity of seeing, not only *Sulgrave Manor,* in which so many Americans are deeply interested, but also of visiting one or two other places of historic fame which had associations with their own national history. The day, it is hoped and believed, will in a very vivid and interesting way remind our American guests of the racial affinities and historical points of contact which unite so closely the British and American people. The countryside, in summertime, around Sulgrave is full of charm and beauty; and, given a fine day, we hope to give our American visitors a very memorable and delightful outing.

Visit to Paris

July 29, 30 and 31, 1924

The Special Committee appointed to arrange the details of the visit of the American Bar Association to Paris in acceptance of the invitation of the Paris Bar reports as follows:

Tentative Paris Programme

Tuesday, July 29th, reception in the afternoon by the Paris Bar at the Palais de Justice, followed by a reception in the evening at the Hotel de Ville.

Wednesday, July 30th, visit to Versailles or Rambouillet, followed by evening reception in Paris not yet definitely arranged.

Thursday, July 31st, reception by the France-America Committee.

There will be other functions of which notice will be given in due course to all who notify Mr. Wadhams, 78 Chapel Street, Albany, of their intention to visit Paris and to be present at the receptions that may be arranged there.

So far nearly three hundred members have signified their intention to attend the Paris functions. Great inconvenience may be caused if any members desiring to attend further delay notifying Mr. Wadhams. Some reasonably definite approximation of the number to be entertained must be promptly communicated to Paris.

A committee of American lawyers practising in Paris has kindly consented to cooperate with the undersigned. This Paris committee consists of Hugh A. Bayne (of Coudert Brothers), Chairman, Watson C. Emmet, Secretary, and Donald Harper, Beniamin F. Conner, Gethering C. Miller and Lovering Hill.

Arrangements have been made for headquarters in Paris at the rooms of the France-American Committee, 82 Avenue des Champs Elysées, and at the hotel of the Carnegie Foundation for International Peace, 173 Boulevard Saint Germain. Accommodations will be provided at each of these headquarters, so that members of the American Bar Association may have their mail addressed there, meet and confer there, find there the assistance of clerks and stenographers speaking and writing both English and French, etc.

Messrs. Thomas Cook & Son have been requested to make the necessary arrangements for the transportation of members and their families from London to Paris and hotel accommodations at Paris, and members desiring assistance must communicate directly with them at their New York address, No. 585 Fifth Avenue.

There will undoubtedly be an unusually large amount of travel and crowding between London and Paris during the last week in July, and the Olympic Games in Paris do not end until July 30th. Some difficulty, therefore, may be met in securing satisfactory transportation and hotel accommodations, and hence definite arrangements should be made as promptly as possible through Messrs. Thomas Cook & Son, or otherwise.

For further information as to Paris functions, members should communicate with the Chairman, No. 37 Wall Street, New York City, but for information as to transportation or hotel accommodations applica-

tion must be made exclusively to Messrs. Thomas Cook & Son.

WILLIAM D. GUTHRIE, Chairman,
FREDERIC R. COUDERT,
GEORGE DENEGRE,
GEORGE B. ROSE,
JAMES BROWN SCOTT,
SILAS H. STRAWN,
GEORGE W. WICKERSHAM,

New York, June 18, 1924.

Visit of the American Bar Association, London, July, 1924

Program as Amended, May 2, 1924

(Subject to further changes)

Saturday, July 19

Arrival

Sunday, July 20

Services in Westminster Abbey (400 each).....10:15 a. m. and 3:00 p. m.
Services in St. Paul's (any number).....10:30 a. m.
Services in Westminster Cathedral (any number).....11:00 a. m.

Mon., Tues., Wed. and Thurs. Mornings, July 21, 22, 23 and 24

Record Office, special visits with guides.....10:30 a. m. to 12:30 p. m.
Law Courts, special visits with guides.....10:30 a. m. to 12:30 p. m.

(All members in parties to be formed for above visits)

Monday, July 21

Official Welcome in Westminster Hall (all members and wives).....11:15 a. m.
Dinners at Four Inns of Court and Law Society (half in five parties to be assigned).7 p. m.

Tuesday, July 22

American Ambassador and Mrs. Kellogg at home, Crewe House, Curzon Street (all members).....4:00 p. m.
Dinners at Four Inns of Court and Law Society (half in five parties to be assigned).....7:00 p. m.

Wednesday, July 23

Presentation of Blackstone Memorial (all members).....3:00 p. m.
Garden Parties at Lincoln's Inn and Gray's Inn (all).....4:00 p. m.
Lord Mayor's Reception and Banquet....7:00 p. m.
Other Dinners (details later).....7:00 p. m.

(All members in parties to be assigned to banquet and dinners)

Thursday, July 24

Garden Party (all; details later).....Afternoon

Friday, July 25

Sulgrave Manor. Special train to Northampton, thence by bus to Sulgrave Manor, with luncheon at Manor, returning not later than 6 p. m. (500).....Leave 10:00 a. m.
Garden Party at Clieveden, seat of Lord Astor, Friday afternoon.
Reception by the Lord Chancellor and Miss Haldane, Earl and Countess Birkenhead, Viscount and Viscountess Cave, Viscount Findlay, Lord and Lady Buckmaster in House of Parliament.....9:00 to 11:00 p. m.

Saturday, July 26

Visits to Oxford and Cambridge (two parties of 300 each).....9:00 a. m. to 5:00 p. m.

Program for Pennsylvannia Bar Association Meeting

Monday, July 7, 1924—11 a. m.

Meeting of Executive Committee.

2:30 P. M.

President's Address—Richard E. Cochran, Esq., York.
Reading of Minutes.
Treasurer's Report—Fidelity Trust Company, Philadelphia.
Secretary's Report—Harold B. Beitler, Esq., Philadelphia.

REPORTS OF COMMITTEES

Executive, William R. Scott, Esq., Allegheny, Chairman.
Civil Law, Hon. George E. Alter, Allegheny, Acting Chairman.
Criminal Law, Edwin M. Abbott, Esq., Philadelphia, Chairman.
Legal Education and Biography, Hon. Charles E. Terry, Wyoming, Chairman.
Admissions, H. Eugene Heine, Esq., Philadelphia, Chairman.
Uniform State Laws, Hon. William M. Hargest, Dauphin, Chairman.
Revision and Unification of the Statutes, John B. Brooks, Esq., Erie, Chairman.
To Present Resolutions Concerning Modernizing and Making Uniform the Procedure of the Court, and to Cooperate with the American Bar Association's Committee on Uniform Judicial Procedure, William W. Ryon, Esq., Northumberland, Chairman.
Grievances, Hon. Robert Grey Bushang, Berks, Chairman.
To confer with the Supreme and the Superior Courts Regarding the Creation of a Board of Censors for the State, Paul H. Gaither, Esq., Westmoreland, Chairman.
To Investigate the Jury System in the Several Counties of the Commonwealth, William S. Dalzell, Esq., Allegheny, Chairman.
To Consider the Advisability of Amending the By-Laws with Respect to the Requirements for Membership in the Association, John C. Hinckley, Esq., Philadelphia, Chairman.
Uniform Court Rules, William W. Ryon, Esq., Northumberland, Chairman.
Program, James P. O'Laughlin, Esq., Clearfield, Chairman.
Publicity, Cyrus G. Derr, Esq., Berks, Chairman.
Professional Ethics, Edwin W. Smith, Esq., Allegheny, Chairman.
Legal Education, Hon. J. J. Miller, Allegheny, Chairman.
Social Activities, Arthur M. Eastburn, Bucks, Chairman.
Power of Supreme Court to Declare Acts Unconstitutional, Ira Jewell Williams, Esq., Philadelphia, Chairman.
Citizenship, Benjamin H. Ludlow, Esq., Philadelphia, Chairman.
Legal Aid, John S. Bradway, Esq., Philadelphia, Chairman.
Report of Delegates to American Bar Association.
Report of Delegates to Comparative Law Bureau.
Report of Delegates to Section of Criminal Law of American Bar Association.
Report of Delegates to Special Conference of Representatives of American Bar Association with Delegates from State and Local Bar Associations.
Appointment of Committee on Nominations.
Consideration of Reports of Committees.

8:30 P. M.

Further Consideration of Reports of Committees.
Unfinished Business.
Election of Officers.
New Business.
Organization Meeting of Executive Committee.

Tuesday, July 8, 1924

2:30 P. M.

Joint Meeting with American Bar Association, Academy of Music.
Address: by Hon. George Wharton Pepper, United States Senator from Pennsylvania. Subject: "Injunctions in Labor Disputes."
Address: by Hon. George E. Alter, Allegheny. Subject: "Securing a Model of Criminal Procedure."

POLITICAL AND ECONOMIC REVIEW

Law and War

MORE than a year ago Senator Borah introduced a resolution embodying what is known as the Knox-Levinson plan for the "outlawry" of war. Wars are to be declared criminal, except wars of self-defence; a code of international law is to be drafted by a commission of jurists; and a court set up with jurisdiction over all international disputes. A debate on the plan is to be found in *The Forum* for January, between Mr. S. C. Levinson (the author of the plan) and Professor Jesse Siddall Reeves. The plan has the support of Professor John Dewey, who has contributed articles on the subject to the *New Republic*—among other issues, to those of March 21, 1923, April 25, 1923, and (in answer to a criticism of the plan by Walter Lippmann) October 3 and October 24. Mr. Lippmann's criticism was in the *Atlantic Monthly* for August, 1923. The plan contains "no provision for sanctions of international coercion and penalization," as Mr. Dewey points out in his April 25 article. This he considers a merit, for to have such a provision would mean "the perpetuation of that attitude of mind that perpetuates war." Moral force he apparently thinks would suffice, for in his reply to Mr. Lippmann he says that under this plan questions of prestige and honor "will suddenly lose their present importance, except for a nation that is willing to defy by criminal action the decision of a court and the public opinion of the world." Yet the legal stigma is no infallible preventive of war, as is attested by the existence of "wars of liberation." Such wars, as both Mr. Dewey and Mr. Levinson point out, are already "criminal," not by international but by domestic law. Yet they occur. Of course, the fallibility of the plan is by no means a ground for rejecting it, but the possibility of some aggressive war breaking out, coupled with the permissibility of defensive war under the plan, would seem to make, quite as much as would international coercion, for the "perpetuation of that attitude of mind that perpetuates war," which Mr. Dewey fears.

I imagine that Mr. Dewey would reply that "criminal" wars of aggression would be much less likely, under his plan, than are "criminal" wars of liberation, since, with a court to pass on the issues which arouse feeling, the real economic conflicts of interest would be of insufficient emotional strength to induce the general population to support a war. Mr. Lippmann pointed out that the settlement of the economic problems required legislation as well as judicial proceedings; and Mr. Dewey admits that if one "conjures up all possible conflicts of national interests," one "will be likely to come out where Mr. Lippmann stands." But, he proceeds, if one "considers the actual antecedents of the wars that the world has endured in the last fifty years," one "will see that these conflicts of interest resulted in war because war is now an authorized way of securing settlement of disputes." Under the Borah plan, thinks Mr. Dewey, economic conflicts would be referred "to the proper organs for dealing with them, namely, the agencies of negotiation and political adjustment." The non-economic but emotional causes (the avowed, not the real ones) would be settled by the court. The real cause of friction between Japan and the United States is hidden behind the avowed issue which concerns immigration. "No one can conceive either Japan or the United States publicly avowing that its real object was the economic control or monopoly of China, and going to court for a decision on that case." It is quite true that neither government would be likely to avow that its real object was the monopoly of China; but it might quite likely avow its object to be its own concrete interpretation of the phrase, "equality of opportunity" or the "open door" in China. Thus I extract the following from an article by the late Premier Hara published in *The Tokyo Diplomatic Review* of September 15, 1921, republished in English in *The Living Age* of January 7, 1922, in which I find quoted in an article by Professor W. W. Willoughby in the *North American Review* for August, 1923: "We Japanese in particular are suffering from the increasing difficulty of living, attributable to our ever waxing population and our ever waning resources. . . Thus, even a single example shows beyond doubt the absolute dependence of lasting peace upon the 'open door'. What I have in mind is the removal of the economic insecurity of some peoples by extending to them the opportunity for free access to the world's resources, eliminating other artificial economic barriers, and adjusting as much as possible, the inequality arising from the earlier discriminations of nature and of history." Is Mr. Dewey quite sure that if Japan were threatened with a famine, her statesmen would refrain from making war on the principle avowed by Mr. Hara? Or that the United States, though not actually attacked, would refrain from opposing the claim by war? The opposition of the United states, of course, would be based on the avowal that the Japanese claim violates the "true" principle of the open door; or, as Mr. Willoughby put it, that the Japanese are attempting to establish a "communistic" principle. Is it certain that these claims contain insufficient emotional strength to lead to war? Is it possible that they would not lead to it. But how can one imagine they would not even be put forth before the court? Why should not the court be asked (by the Japanese, in this instance) to modify the results that political adjustment and negotiation would bring about? Leaving these issues, as Mr. Dewey would leave them, to "the agencies of negotiation and political adjustment," is like leaving all domestic economic issues to "free bargaining." Now "free bargaining" is merely fighting with non-violent, but none the less coercive, weapons, and with violence in the background. The owner of any particular piece of property proposes to make it more or less painful (sometimes even to the point of starvation) to the other party by refusing to open the legal gateway to the use of that property unless the other party complies with certain terms; and the other party can usually bring some sort of pressure against the first. Should either party attempt to use the property of the other without the latter's opening of the legal gateway, that gateway will be kept closed by the officials of the government, by violence if necessary. As most of the weapons used in bargaining consist of law-given property rights, and as they are of very unequal power, they result in great inequality of wealth. Sometimes the acquisition of the superior legal rights results from superior economic service, but sometimes not. At any rate there seems to be a tendency for more and more conscious governmental modification of some of the inequalities resulting from

"free bargaining." Now the international process of "negotiation and political adjustment" is likewise a fight, which, under the Borah plan, would be conducted by non-violent coercion, with violence in the background. Unless the court had jurisdiction to modify international property rights, it is conceivable that situations might arise under which other governments might quite lawfully starve the Japanese, by withholding from them access to natural resources. Any individual Japanese, or any Japanese official, attempting to use these resources without consent of the government in whose territories they were located, would be guilty of a tort or a crime under the local laws; the officials of the local government would use violence against the trespassing Japanese, and no legal stigma would be attached to this violence. The Japanese would then either have to force the local government to consent, by threatening to break the peace in a manner which would be stigmatized as criminal, or they would have to starve, or they would have to acquire access by submission to severe terms imposed upon them by the weapon of peaceful starvation with which the other government would negotiate. Though Mr. Dewey and I might consider war the worst of the three alternatives (even from the viewpoint of the Japanese), it is by no means clear that the Japanese themselves would consider it worse than being reduced to the position of a hungry proletariat. And if they should shun war, it is still rather harsh to relegate the matter to negotiation and force them into one of the other alternatives.

But suppose the court should take jurisdiction of economic issues and declare that the local government must grant mineral rights to Japanese concerns on certain terms. Will it be declared a crime for the local government to refuse to comply? And will this declaration be psychologically sufficient to prevent the local government from enforcing the law which the court condemns? Would not the court be much more effective if there were an international executive force prepared to coerce, not governments as such, but individuals who defy the court? The court could then create international rights in and impose international duties on individuals, analogous to rights and duties created by our own Federal courts. Furthermore, would not the solutions of the economic problems be more satisfactory to a larger number, and less likely to be biased by legal abstractions, if the court were subordinate, in questions of policy, to an international legislature or to a series of regional legislatures, more flexible and more representative of the feelings of the people than any group of judges is apt to be?

Mr. Dewey and Mr. Levinson refer to disputes between our own states which have been settled peaceably by the Supreme Court without apparent power to force any state to submit. Yet as Mr. Lippmann points out, the Court has not accomplished this without the aid of Congress and the executive departments. Local interests have not been confined to a choice between negotiation and adjudication. They have been able to appeal to Congress and the voters. The kinds of economic conflicts which result in war are seldom the kind which are adjudicated in litigation between our states. They are usually dealt with by Congress or an administrative agency under the authority of the commerce clause, as Professor T. R. Powell pointed out some years ago, if my memory is correct, in a review of a book by James Brown Scott.

These criticisms point to no positive evil in the Borah plan, nor do they lead, as far as I can see, either to acceptance or rejection of the present League of Nations or the World Court. Perhaps it would be well to adopt the Borah plan. With or without it, however, the solution of international conflicts of interest would be more likely to be peaceful if men with realistic minds, like Professor Dewey, would contribute to an analysis of the concrete problems. Had Mr. Dewey recalled the concrete cases in which our Supreme Court has dealt with the legislative power to modify property rights, a mind such as his could not have said, in answer to the question whether Mexico might confiscate American property rights, that "property disputes are just the sort of thing that courts are always dealing with; it needs no radically new code to enable an international court to deal with them." Such an answer, given by one familiar with the cases, would be expected of a conventional leader of the bar, to whom concepts like "equality and justice" appear as major premises from which the proper decisions of cases can be deduced by logical syllogisms. The answer could not be given by one who combined an intimate knowledge of the cases with the realistic habit of thinking taught by Dewey.

ROBERT L. HALE

Columbia University.

Administrative Qualities of Lawyers

"Sir Robert Horne, speaking at the dinner of the Gray's Inn Debating Society last week, said that, although he came there as a lawyer, he was to a certain extent a deserter from the profession. He might have deserted the legal profession for the moment, but he had never deserted the great faith of the profession, for he believed it to be one of the most interesting in life. There was an unfortunate idea prevalent in the country that the law was devoted to hair-splitting argument, and was very seldom devoted to any practical view of human existence. After some experience of life, he knew of no profession which afforded a better training for any line in life which one might afterwards choose to take. He could say that the experience of everyone who was engaged in practical duties during the war had been that there were no people in the country who exhibited higher administrative qualities than the lawyers."—*The Law Journal*, March 22, 1924.

Dail Eireann and The Wig and Gown

"Dail Eireann has been remodelling the legal system in Ireland, described as 'a standing monument of alien Government.' There has been much controversy over the trappings of the Bench and Bar of Gaelic Ireland, but the power of determining the style of the headgear and robes of judges and barristers is left to the Minister for Home Affairs, with the consent of the legal authorities concerned, and he seems to have decided that the old wig and gown are to be swept away. When the United States constituted its Supreme Court there was a similar dispute. Its first session began in 1790. Jefferson had just returned from Paris and was full of enthusiasm for plain democracy without any of the adornments associated with the old order. He was prepared to tolerate the gown, but denounced the proposal to continue wearing the judicial wig. It was 'monstrous,' he said, and made British judges 'look like rats peeping through bunches of oakum.' So the Supreme Court had, and still has, merely black gowns as symbols of its high dignity and authority."—*The Law Journal*, March 22, 1924.

DECISIVE BATTLES OF CONSTITUTIONAL LAW

XV. The Revolution

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

IN the preceding fourteen articles I have covered almost exactly one hundred years of the life of the Supreme Court, considering those decisions which seem to me epochal and formative. Surveying these decisions as a whole it is clear that the formative influence of the Supreme Court has been controlling in retaining the structure of the Government as the Fathers intended it. While the Court has at times been strongly Nationalistic and at other times preponderatingly for the rights of the States, nevertheless the statement of Judge Miller in the Slaughter-House cases is unqualifiedly true:

> Whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Marshall, the strongest of Federalists, respected the rights of the States with the utmost care. It was early established that the State Courts were supreme within their own sphere. That whenever a State Court had interpreted its own Constitution, laws or procedure, such determination was binding upon the Supreme Court of the United States. Marshall brooked no interference in the exercise of national jurisdiction in interpreting "the Constitution, laws and treaties of the United States." But he was equally sedulous to preserve the independence of the States from Federal interference. He saw with the broad vision of a statesman what the founders so clearly saw, that a careful maintenance of the just balance of power between these two sovereignties was necessary for the prosperity and continuity of this Republic. So under the guidance of this great court the centripetal power of the Federal Government and the centrifugal force of the State Governments had been held in absolute balance.

At the end of a hundred years the Federal power had been firmly consolidated and the power of the States remained undiminished. We approach now a Revolution in our form of government accomplished by the Supreme Court of the United States, so startling that it seems almost incredible, and this Revolution was completed so silently that it has passed almost unnoticed even by the careful historians of the Constitution and of the Court.

If there was anything definitely decided by the Slaughter-House Cases it was that the Supreme Court of the United States had no power to interfere with the domestic concerns, Constitutions and Statutes of the States. The doctrine was repeatedly affirmed in the next fifteen years in the Civil Rights and other cases, but from the hour that decision was announced, litigants began a continuous and persistent assault upon the doctrine of the Slaughter-House Cases. Appeals from state decisions under the 14th Amendment, claims that the party had been deprived of his property by state legislation and state decisions without due process of the law, poured in upon the Court. These cases became so numerous that the court at one time somewhat petulantly reproved lawyers who were bringing these cases up from the State courts, and begged them to read again the Slaughter-House decision.

That corporations should seek the protection of the Federal Courts wherever possible is natural. There is, among the great mass of our people a deep rooted hostility to corporations, born partly of fear of these great aggregations of capital, nourished, more or less, by demagogues, but partly growing out of evil practices, corruption and oppression of corporate bodies. To reach the Federal Court and especially the equity side, thereby evading a trial by Jury generally prejudiced against it, is the natural aim of every corporate litigant.

If the Slaughter-House Cases could be reversed or annulled and if the 14th Amendment could be so interpreted as to include within its protection, not only the colored men, but all persons and if a corporation could be held to be a person within the meaning of this Amendment, it would be an enormous gain for corporate litigants.

Therefore lawyers for corporations continuously and skillfully assaulted the court to break down the force of the Slaughter-House decision. In this they had a powerful advocate on the Supreme Bench in Judge Field, who was not only a vigorous Nationalist but believed thoroughly that the Federal Courts were instituted largely to protect invested wealth from confiscatory assaults by any agency of the state.

Five years after the Slaughter-House Cases, in 1877, the case of Davidson vs. New Orleans, 96 U. S., 97, was decided and Judge Miller wrote the opinion. The case involved the validity of the assessment of certain taxes by the city of New Orleans, but the court held inasmuch as the law providing for these taxes gave the taxpayer a hearing in the state court which decided against her, on appeal, that thereby she had had "due process of law." The court did not undertake to investigate the decision of the Supreme Court of Louisiana. It merely examined the Statute and having found that the defendant had had her day in court, that she could not bring herself within the 14th Amendment. The fact that the court considered her claim showed a tendency to extend the doctrine of the Slaughter-House Cases to other persons than those of color. Comparing the language of the 5th Amendment which is identical with that used in the 14th Amendment, Judge Miller remarks:

> It is not a little remarkable, that while this provision (taken from the 5th Amendment) has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Con-

stitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

He then lays down the fundamental proposition that where a person has had his day in court by the ordinary procedure of the state where the case is tried, that is due process of law with which the Supreme Court will not interfere. He says:

That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the XIVth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Vth Amendment, with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, which if we were sitting in review of a Circuit Court of the United States, as we were in the Topeka case, 20 Wall., 655 (87 U. S., XXII, 455), we could take jurisdiction of. But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that where by the laws of the State the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law. This was clearly stated by this court, speaking by the Chief Justice, in the case of Kennard v. Morgan, 92 U. S., 480 (XXIII, 478), and repeated in substance in the case of McMillan v. Anderson, at the present Term. (Ante 335.)

This proposition covers the present case. Before the assessment could be collected, or become effectual the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

This doctrine of the independence of the states wherever their legislation or decisions did not interfere with the national concerns, was first announced in 1798 in the case of Calder vs. Bull, 3d Dall., 386, and continuously affirmed and reinforced in almost every possible sort of a case for nearly one hundred years.

In Galpin vs. Page, 18 Wall., 350, decided in 1874, four years after the 14th Amendment was adopted, the question of the conclusiveness of the finding of a state court as to its own jurisdiction came squarely before the Supreme Court. The finding of the lower and Supreme State Court upon the question of jurisdiction was collaterally attacked in the Federal Court. Judge Field said:

The adjudication of the appellate court (of Cal.) constitutes the law of that case upon the points adjudged, and is binding upon the circuit court and every other court when brought before it for consideration. The circuit court possesses no revisory power over the decisions of the Supreme Court of the State, and any argument to show that that court mistook the law and misjudged the jurisdictional fact, would have been out of place. There were no facts before the circuit court which were not before the Supreme Court of the State when its judgment was pronounced.

Note the language "any argument to show that that court mistook the law and misjudged the jurisdictional fact would have been out of place." Such then was the law down to 1894, in other words for twenty years after the decision in the Slaughter-House Cases. During those years the court had been completely reorganized. The Judges who concurred in the Slaughter-House Decision had died or retired and their places taken by Judges of vastly different training, views and leanings.

We have just noted that in the decision of Galpin vs. Page, the finding of a state court as to its own jurisdiction is final and binding upon the Federal Courts. I turn now to Scott vs. McNeal, 154 U. S., 34, decided in 1894. In that case the plantiff Scott living in the state of Washington, had disappeared from his home. After an absence of more than seven years with nothing heard from him, his wife applied to the Probate Court in the proper county setting forth the facts of his disappearance and the length of time that had elapsed, and the Probate Court following the presumption of seven years' absence found that Scott was dead and appointed an administrator. The administrator duly applied for authority to sell the real estate of Scott. A piece of land was sold and the title passed by mesne conveyances to the defendant, McNeal. Scott reappeared, forcefully denied that he was dead or ever had been and brought ejectment against McNeal for the possession of this land. It was conceded that all of the proceedings connected with the sale of the land had been regular and according to law. It was a collateral attack and Scott relied upon the 14th Amendment to invalidate these transfers, arguing that inasmuch as he was alive when the administration was had he had been deprived of his property without due process of law. The lower court held that the proceedings were regular, that the presumption of death arising from seven years' absence under the Washington law was conclusive as to the property rights involved and denied the plaintiff any relief. He appealed to the Supreme Court of Washington, and the case is reported in 5th Wash., 309. The Supreme Court affirmed the decision of the lower court and denied the plaintiff any relief and he appealed to the Supreme Court of the United States. The Supreme Court held that under the 14th Amendment Scott had been deprived of his property without due process of law and reversed the case. It disregarded the findings of the lower courts as to jurisdiction, ignored all of its previous decisions from the Slaughter-House Cases on and held that wherever the question of jurisdiction was raised the Supreme Court under the 14th Amendment could examine the jurisdiction of the state

court and that it was not bound, as held in Galpin vs. Page, by the finding of the state court upon this jurisdictional matter.

The amazing thing about the case is that while it reverses in effect the doctrine of at least eight of its own decisions not the slightest reference is made to any of them. So far as the court's opinion is concerned, the great decisions in the Slaughter-House Cases and Davidson vs. New Orleans, might have been so much waste paper. It ignores the fact that Scott had had his day in court, had had a fair trial with all the forms of law and that therefore either he had had due process of law or else the decision in Davidson vs. New Orleans was not the law of the Supreme Court, but no reference is made to that case. The court cites some of the Civil Rights Cases which I have noted in a previous article, such as *Ex Parte* Virginia, that the provisions of the 14th Amendment "extend to the acts of the state whether through its legislative, its executive, or its judicial authorities." None of these decisions are authority in any way for the decision in Scott vs. McNeal. For instance, in *Ex Parte* Virginia which was the colored Jurors case, the court expressly held that the County Judge in drawing the Jury was not acting in a judicial capacity. In fact down to the decision of Scott vs. McNeal no decision had yet held that the 14th Amendment applied to judicial acts performed in the due course of the law of the state in a trial where the party complaining had had full opportunity to defend and right of appeal. Such cases had been uniformly held to be outside the purview of the 14th Amendment however else it might be interpreted.

By this decision the court in effect constituted itself a court of appeal and errors from every decision of the State Supreme Court where the question of jurisdiction was invoked. This opened a whole new field of jurisdiction that has been largely occupied by litigants and has greatly increased the labors of the court. That it was revolutionary in its character, no candid mind can doubt.

I turn now to another phase of this Revolution, equally remarkable. The Railroad corporations were continuously appealing to the Supreme Court from various restrictions, burdens, and servitudes imposed by the state Legislatures invoking always the 14th Amendment. The court uniformly considered these appeals and as uniformly denied them.

One of the crucial cases was Stone vs. Farmers Loan & Trust Company, 116 U. S. 307, decided in 1886, where the Mobile and Ohio Railroad Company appealed from a law of Mississippi establishing a Railroad Commission with power to regulate rates. The railroad company relied upon its charter as a perpetual grant of power to fix its own rates. The Supreme Court held that the Legislature could not thus part with its police power of rate regulation unless it was shown by the charter in the plainest and most specific terms and the claim was denied. Upon the question of the 14th Amendment the court held that the state had a right to establish a Railroad Commission with power to fix rates but as the Commission had not as yet fixed rates, no right of the railroad company had been impaired and the appeal was dismissed, but in the course of the decision, the court used this language after upholding the power of regulation:

> From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

This was pure dictum, unnecessary to the decision of the case but it expressed the views of the court. It was a warning that railroad property could not be confiscated by the will of the state Legislature. The court had already overruled its decision in the Granger Cases holding that the power to fix rates was purely legislative with which the courts could not interfere. It will be noted that in the paragraph just quoted the court held that a rate that did not give the railroad company a return upon its investments would amount to the taking of private property for public use without compensation. A most righteous decision, applicable to all these statutes in all courts.

In all of these cases the question of whether a corporation is a person under the 14th Amendment had not been discussed by the court. In Minneapolis Railroad Company vs. Beckwith, 129 U. S. 26, decided in 1898, this momentous proposition was thus disposed of by the court in the opinion of Judge Field, considering the 14th Amendment:

> It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in Santa Clara Co. vs. Railroad Co., 118 U. S., 394, 396, 6 Sup. Ct. Rep. 1132, and the doctrine was reasserted in Mining Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sup. Ct. Rep. 737. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

It will be noted that there is here no discussion, no reasoning in favor of this proposition. Judge Field said that it was so held in Santa Clara Co. vs. Railroad Company, 118 U. S., 394. When we turn to that case we find that nothing of the sort was held. The question of whether the word person in the 14th Amendment included corporations was not even mentioned in the Santa Clara Co. Case. In that case the law of California provided that real estate and improvements should be assessed separately and that among the various kinds of improvements were fences. The state attempted to assess the fences as part of the railroad right of way. The company paid the tax under protest and brought suit in the Federal court to recover. Judge Field sitting in Circuit, decided in favor of the Railroad Company there and held that the word person included corporations. When it came to the Supreme Court of the United States on appeal the court after noting the constitutional question raised by the railroad said:

> The propositions embodied in the conclusions reached in the circuit court were discussed with marked ability by counsel who appeared in this court for the respective parties. Their importance cannot well be over-estimated; for they not only involve a construction of the recent amendments to the national constitution in their application to the constitution and the legislation of a state, but upon their determination, if it were necessary to consider them, would depend the system of taxation devised by that state for raising revenue, from certain corporations, for the support of her government. These questions belong to a class which this court should not decide unless

> their determination is essential to the disposal of the case in which they arise. Whether the present case require a decision of them depends upon the soundness of another proposition, upon which the court below, in view of its conclusions upon other issues, did not deem it necessary to pass.

It then proceeds to discuss the law of California, decides that under that law the fences are not part of the road-bed and could not be assessed under the state law, and affirms the decision of the circuit court upon that ground wholly ignoring the question of the 14th Amendment. The court says:

> It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value which the state board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. As the judgment can be sustained upon this ground, it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

It is apparent that Judge Field had mistaken his own opinion in the circuit court for the opinion of the Supreme Court on appeal, probably one of the most curious mistakes ever made by a Judge of the Supreme Court.

Turning to the case of Pembina Mining Company vs. Pennsylvania, 125 U. S. 181, decided in 1888, we find that the court was there considering the question of whether the state could impose a license tax upon a non-resident corporation for the privilege of maintaining an office and doing business in the state. The court held that a state had a right to exclude or admit foreign corporations at its pleasure and in admitting such corporations it could impose conditions which were entirely valid if they were uniform as to all corporations. The question of whether a corporation was a person was not before the court. It was not argued, it was not discussed. The court does say, however, "Under the designation of person there is no doubt that a private corporation is included."

To begin with this general statement of the law is not a correct statement as I shall show later. In this case it was pure dictum. That was equally true of the statement in the Beckwith case because the court there held that the Iowa Statute under consideration was valid and it was not necessary to consider whether the 14th Amendment would apply. From thence on without any further discussion, in treating these cases as having settled the matter the Supreme Court has uniformly held that the word "person" includes "corporations" under the 14th Amendment.

Considering the vast mass of litigation which this doctrine has created and which now overwhelms the court, it is certainly an astonishing thing that the principle should have been adopted thus without discussion, without reasoning, without considering binding precedents in the past decisions of the court.

I propose now to discuss the reasonableness of this classification. In so doing it will be understood that I am not discussing the abstract justice of this inclusion. Of course corporations should have every legal right for the protection of their property, that is given to individuals. That is not the question here. The question is, did Congress in submitting the Amendment and the states in adopting it intend to change the form of the Constitution, destroy the power of the states and of state courts as they had existed under the Constitution for a hundred years? It will be observed that these decisions completely nullify the doctrine of the Slaughter-House cases without even alluding to that decision. So in considering the propriety of extending the word "person" to include "corporations" we will disregard for the moment the decision of the Slaughter-House cases as the Supreme Court has done and consider the Amendment itself.

It is true that very frequently the courts hold that the word "person" includes "corporations." It has been so held in many penal as well as civil Statutes. There is much confusion, however, as to when this inclusion should be applied. Some courts, in fact many courts, hold that the inclusion will not be made unless it was the plain intent of the Legislature that it should be. Probably the best test of such inclusion is to be found in a decision of the Supreme Court itself, Beaston vs. Bank, 12 Pet., 102. In that case the court had under consideration a Statute which made the Government a preferred creditor where a "person" indebted to the Government became insolvent. The question was whether as there used, the word person included corporations, the suit being against a corporation. Judge McKinley thus expresses the test:

> Corporations are to be deemed and considered persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such Statutes.

The court finds that the corporate defendant in that case was placed in circumstances identical with those of a "person" who had become insolvent and holds that in such case the word person includes corporations. This is a clear and logical test and it is a test which the Supreme Court has set up, although no allusion was made to this case by Judge Field. Turning to the 14th Amendment, the first section contains two propositions, the second dependent upon the first. The first is, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Certainly this cannot include corporations, as corporations can neither be born nor naturalized. The intention of this provision as decided in the Slaughter-House Cases was to make every person born in the United States a citizen of the United States regardless of whether he was at a particular time a citizen of any particular state under its law. It created in effect a national citizenship, citizenship theretofore having been entirely a matter for the states to regulate. It then proceeds with the provision that has been so often and so much mooted, that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." The word citizen as here used undoubtedly refers back to the citizenship created by the preceding paragraph, a citizenship composed of persons either born in the United States or naturalized, and the court as late as 1869 in the case of Paul vs. Virginia, 8 Wall., 168, had expressly held that a corporation was not a citizen under the second section of the 4th Article of the Constitution from which this language is taken verbatim. Follows a semicolon and then "nor shall any state deprive any person of life, liberty or property, etc." The privileges and the immunities of the citizen and the protection of the person are thus inclosed in one paragraph.

It is to me extraordinary that anyone can hold that it was ever the intention in adopting this amendment that the word person as last used above was intended to include anything but a natural person because the entire section up to that point clearly speaks of natural persons and no others. The second section provides for the apportionment of representatives

among the several states according to their respective numbers, "counting the whole number of persons in each state." The third section provides "no person, etc., shall be eligible to office who has been engaged in insurrection against the United States."

It will not do in construing this great Amendment to wrench a single paragraph from its context and interpret its meaning when thus isolated. Like a will it must be read from the four corners to obtain the intent of whoever framed it. So read, the Amendment speaks of persons five times. In four of them the reference cannot be to any one but natural persons. Are we to say then that the word person as used in the last paragraph of the first section, meant something other and different from its meaning in the other four places? If we adopt the test of the Supreme Court itself we shall find it difficult to think so. Are corporations placed in circumstances identical with those of natural persons expressly included throughout the amendment? Certainly that cannot be. The prohibition in the very language of the paragraph we speak of includes not only deprivation of property but of life and liberty. Certainly a corporation has neither life nor liberty which are here mentioned. Life as used here means physical life, liberty means personal liberty. In order to meet the Supreme Court's views the paragraph would have to read like this: "nor shall any state deprive any person of life or liberty or any person or corporation of property." That is the meaning which Judge Field's decision gives to the expression which in the Amendment is "nor shall any state deprive any person of life, liberty or property."

No court outside of the Supreme Court of the United States has ever held a corporation to be a person under a Statute similar in language or in intent to this. If we consider the entire amendment regardless of its history and the political events which impelled its adoption, the conclusion is irresistible that the Amendment throughout speaks of and was intended to be confined to natural persons. Throughout it deals exclusively with natural persons, with their citizenship, their life, their liberty, their enumeration for representative purposes and their disfranchisement for insurrection, and yet the court says, in spite of that that the word "person" when it comes to property and property alone, is intended to include corporations.

Judge Field did not undertake nor has any other Judge of the Supreme Court undertaken to analyze this Amendment and give any sort of a reason why it was intended to include corporations. No Judge has done so simply because no Judge can. I submit to any candid mind that these decisions and there are some that I have yet to cite, have amended the Constitution of the United States by the act of the judiciary alone without any vote of the people who made and who alone can alter the Constitution.

The testimony of Judge Miller and his associates in his review of the events which led up to the adoption of the 14th Amendment, a chronicle of events which is in no wise challenged or disputed by the minority opinions, ought to be sufficient but a further test may be applied. Will any candid student of our political history assert that the states would have adopted this amendment clearly phrased as it is if they had known that the Supreme Court would ultimately place its present construction on it; that in adopting this amendment they were surrendering a large portion of that independence of the states which they had enjoyed from the beginning; that they were degrading the dignity and jurisdiction of their own Supreme Courts, making them in effect mere intermediate courts of appeal on the way to the final tribunal; that as Miller predicted they were placing the Supreme Court as a Board of Censors to sit in judgment upon every state enactment that affects corporations; that their action was to paralyze and render of the slightest value all future state regulations of public utilities and orders of public utility commissions? No sane and candid student will make such an assertion. If that be true then either the adoption of the amendment was procured by false pretenses on the part of Congress or the intention of the people has been thwarted by the will of the Supreme Court. But Congress no more dreamed of such a construction when it suggested the amendment than did the states when they adopted it. All contemporary discussion at the time of the adoption by public men and the press shows clearly that the 14th Amendment was supposed to be a mere corollary of the 13th conferring citizenship upon the blacks just emancipated and protecting that citizenship and but for that belief the amendment never would have been adopted.

Indeed the Supreme Court very early established the historical rule of interpretation. In Rhode Island vs. Massachusetts, 12th Pet. 657, the court said:

> In the construction of the Constitution we must look to the history of the times and examine the state of things existing when it was framed and adopted.

And in the income tax cases, Pollock vs. Farmers Loan and Trust Company, 157 U. S. 429, the court said:

> In construing the Constitution, the court is at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequence naturally attendant upon the one construction or the other.

To pursue the story of the Revolution. In C. M. & St. P. Railway Company vs. Minnesota, 134 U. S. 418, decided in 1890 which came up on a writ of error to the Supreme Court of Minnesota, the rate law of Minnesota was called in question. It established a Railroad Commission with power to fix rates but made its findings conclusive and made it the duty of the Supreme Court of the state when the Commission should apply to it, by mandamus to impose these rates upon the carriers. The court held the law invalid only because it deprived the carriers of a right to a judicial review of the reasonableness of the rates. This was in entire harmony with Davidson vs. New Orleans.

A series of cases immediately followed beginning with the Texas Railroad Commission cases, 154 U. S 362, by which very shortly the Supreme Court assumed and still retains complete control of the rate-making of every public utility whether interstate or intrastate. In the much discussed case of Smyth vs. Ames, 169 U. S., 466, the court established the basis of rate-making upon "reproduction value." Several speculative elements such as "going value," loss during preliminary period, etc., have since been added, so that today the basis of rate-making so far from being scientific is as puzzling and distracting as the famous "rule of reason" in the Anti-Trust Cases.

The Revolution was now complete. It has resulted in an enormous increase in the business of the court. In the last twenty-five years more than two thousand of these cases have been taken to the Supreme Court and more than eight hundred decided, the others being dismissed for want of merit. A curious thing about this Revolution is the fact that all the his-

torians of the Supreme Court, that I have been able to examine, make no allusion to this vast change in our form of Government. All of them leave the impression that the doctrine of the Slaughter-House Cases is still in full force. There seems to be a conspiracy of silence on the subject. Undoubtedly every lawyer whose practice is corporate or chiefly so, will approve of this Revolution. That is natural. The dyer's hand is "subdued to what it works in." But to the thoughtful and impartial lawyer there is a question whether it is worth while to prevent occasional injustice to corporations, by completely destroying that balance of power between the nation and the states that was so carefully established by the founders and so sedulously guarded by the Supreme Court for more than a hundred years.

The Supreme Court itself took the first step towards centralization and Congress and the Executive have been swift to follow. As a result, the states have lost their old robust vigor and independence. They have been degraded in effect to mere geographical expressions. Their Supreme Courts are no longer courts of last resort but intermediate tribunals and the Supreme Court of the United States sits as a Board of Censors upon every state enactment that affects corporations, whether local or interstate. This is precisely what Miller predicted would happen if the present interpretation of the 14th Amendment were adopted. The result of this centralization has been to build up a great Bureaucracy in Washington with more than seven hundred thousand members, constantly increasing. The greatest danger to this country is not from below but from above; not from the Reds and Anarchists but from the Bureaucrats. It is profoundly significant, although apparently unnoted by the public, that the scandals that have been rife in Washington have not touched the elective servants of the people, Congress and the President. All the slime and filth of corruption, bribery, and malversation is confined and absolutely limited to the Bureaucracy. Such has it been in all history. It was the corruption and inefficiency of the Bureaucracy and not Tzarism that destroyed the great Russian Empire. It was the corruption and inefficiency of the Italian Bureaucracy as much as Bolshevism that drove Italy into the arms of Fascisti. It was the corruption and inefficiency of the Spanish Bureaucracy that compelled a Dictatorship. And the Washington Bureaucracy with its strangle hold on the government, its corruption and inefficiency, is running true to historical form. A Bureaucracy is the most odious of all tyrannies because it is anonymous. While we have been pursuing this course our English cousins have been decentralizing, not only granting full self-government to their Colonies and to Ireland, but decentralizing at home by establishing such local governmental bodies as the London County Council with legislative and administrative powers almost equal to our state.

It will be observed that I am against any Revolution whether from below or above. I am opposed to any Amendment to the Constitution that is not adopted by the people. In short, upon the question of the Constitution I am a Counter-Revolutionalist, a reactionary. I would replace the ancient land marks and re-light the old beacons that burned with an illumining power for more than a hundred years. While the present court has no outstanding figures like Marshall, Taney and Miller, in the average of its ability, in its composite character it has not been surpassed by any in our history. It seems to me that I see signs of a reaction in its decisions, a tendency of the pendulum to swing towards state rights. I hope this is true. If I did not hope so, I should fear for this Republic.

I do not think that I exaggerate the immeasureable importance of the Federative principle and the independence of the States.

I quote from the greatest American historian of our times, John Fiske, in the Critical Period of American History:

> If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the states shall have been so far lost as that of the departments of France, or even so far as that of the counties of England—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever.

(EDITOR'S NOTE: This is the XV and last of the Decisive Battle of Constitutional Law which together with "The Story of the Constitution" by the same author will shortly appear in book form.)

Early French Regulation of Bar

"The Establishments of Louis IX., published in 1270, afford the first example of anything approaching to a regular code of French law. The fourteen chapters of the second book of the Establishments contain several regulations of great importance with regard to the profession of advocate. Thus, one rule provides, that all arguments calculated to injure the opposite party should be spoken courteously without abusive language either as to fact or law; and another forbids the advocate to make any bargain with the party for whom he pleads for a share of the matter in litigation. A subsequent law of Philip the Bold, published in 1274, imposed upon advocates the obligation of taking an oath, that they would only take charge of those causes which they believed to be just, the refusal to take oath being punished with interdiction. The second and third articles of this law treated of the fees of advocates which were to be proportioned to the importance of the cause and the skill of the pleader. The fee was never to exceed 30 livres turnois, equivalent to about £27 of our money. Advocates were to swear that they would receive nothing above that sum, directly or indirectly, and they were liable to be declared infamous, and to be perpetually interdicted for any violation of this oath."—*The Law Times*, May 24.

Uncontrollable Impulse

"The House of Lords the other day considered and rejected Lord Darling's Criminal Responsibility (Trials) Bill, in which it was sought to set up a third to the two existing McNaghten rules which are the guiding principles in cases where the sanity of an accused person is at issue. Lord Darling found himself alone in his advocacy on the reform of law regarding 'uncontrollable impulse.' The rule he sought to pass into law laid it down that an accused person may be held not to be responsible for his act, if at the time he was suffering from such state of mental disease as therefrom to be wholly incapable of resisting an impulse to do the act or make the omission."—*The Law Times*, May 31, 1924.

THE REFERENDUM IN CANADA

Although Referendum Has No Rightful Place in Canadian Theory of Politics, It Has Come to Stay and Public Opinion Views It With Increasing Favor as Means of Deciding Certain Questions of Wide General Interest

By Dean Herbert A. Smith
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UNDER the British system of parliamentary government which prevails in Canada the referendum is an exotic plant. It has no rightful place in the theory of politics which has been gradually worked out by practice during the last two hundred years, and its acceptance may possibly lead to an important readjustment of our political ideas.

Whether it be so exotic or not, we must realize that in the government of nations theories must adapt themselves to facts, and there can now be no question that in Canada the referendum has come to stay. During the last year the provinces of Manitoba and Alberta have each submitted the liquor question to a popular vote, and we are now officially informed that the governments of Ontario and Saskatchewan are going to follow suit. In each case the submission of the question to the people is a voluntary act of the provincial government concerned, there being no constitutional provisions which render such action compulsory. Some years ago an attempt was made to introduce into the constitutional law of Manitoba a scheme, framed after well known American models, which would have made the referendum an obligatory method of legislation in certain cases. The Privy Council, however, ruled this enactment to be beyond the legislative powers of the province, and it therefore follows that no province can establish the referendum as a permanent and compulsory part of its political machinery.[1] Nevertheless, the ruling does not forbid the use of the referendum as a voluntary method of settling controversial issues, and it is now becoming more and more clear that public opinion is coming to view with increasing favour this means of deciding certain questions which arouse a wide general interest. Up to the present time the referendum has only been used for the purpose of ascertaining the popular will upon the eternal question of liquor, but there is no reason why it should not be extended to the settlement of other controversies which are intrinsically suitable for submission to a popular vote.

If then the use of the referendum so clearly accords with public opinion in Canada, why are we justified in calling it an exotic plant? The answer lies in the fact that it is clearly inconsistent with that principle of the co-ordination of legislative and executive powers which lies at the root of modern British institutions.

For a century and a half Americans have now been trained to act upon the political doctrine which is known as that of the "separation of powers." By this it is meant that there is a threefold division of the functions of government into executive, legislative, and judicial powers. Each of these three activities is intended to act in independence of the other two, and they are only united by their common dependence upon "the people." Needless to say, this theory is not, and cannot be, applied with strict logic to the whole machinery of government. There always must be certain areas in which the various activities inevitably overlap. Nevertheless, it is broadly true to say that every American tends to regard the executive branch of government as a thing independent of the legislature, and finds nothing abnormal or unconstitutional in the spectacle of a conflict between the two.

In contrast with this doctrine the British theory of parliamentary government demands that the executive and the legislature shall be so closely geared together that they must operate practically as a single piece of mechanism. If by chance they disagree and are thrown out of gear, then the machinery of government is temporarily stopped, and the constitutional means of repairing the breakdown is provided by a general election, the function of which is to restore the harmonious co-operation of the different parts. Either the executive obtains a new majority which will support its policy, or it resigns and gives place to a new cabinet which will agree with the elected assembly. In either case the two parts of the machine are again put in gear.

The most important practical consequence of the British doctrine is that it throws upon the cabinet or executive government the responsibility for all legislative policy. The ministers are expected to prepare and initiate all bills of any importance, and the refusal of the assembly to pass an important measure is equivalent to a vote of no confidence, with the result that the cabinet must either resign in favour of their opponents or must dissolve the House and appeal to the people in a general election. Conversely, no bill that the ministry disapprove can ever pass through the assembly. Under the American system the head of the executive department has no more than a limited right of veto over measures that have passed both houses of the legislature. Under the parliamentary system the executive cabinet has from first to last a practically unlimited power both of initiation and of control.

It is at this point that the referendmu breaks in to disturb the ordered harmony of parliamentary government, for the referendum introduces a new mode of legislation over which the ministry claims no control, and for the results of which it is not responsible. The consequences are somewhat illogical. According to the accepted practice a cabinet is bound to resign if its legislation fails to command the support of the elected assembly. Logically it would therefore seem even more desirable that the government should resign in the event of its legislative policy being condemned by the vote of the whole people. But the actual course of events is not shaping itself according to the logic of po-

1. A Dominion statute now enables a province which has adopted prohibition to prohibit the importation of liquor after taking a referendum on the question. Apart from this, the referendum has no permanent place in the law of Canada.

litical theory. During the past year the question of liquor control has been submitted to a referendum both in Manitoba and in Alberta, the issue in each case being between complete prohibition and restricted sale through government agencies. In each case the provincial cabinet was strongly prohibitionist in principle and rested upon the support of the "Farmers' Party," which had made prohibition a plank in its electoral platform. Some of the cabinet ministers even took an active part in the compaign on the prohibition side. In each case the people voted by large majorities in favour of substituting a system of government sale for the existing prohibition régime. Yet in neither case did the cabinet feel called upon to resign in consequence of the popular vote by which their declared policy was unequivocally condemned. They have remained in office and it now becomes their duty to initiate legislation in order to carry out the will of the people as disclosed by the referendum.

In other words, the practice of the referendum in the Canadian provinces is leading us straight towards a modified form of the doctrine of the "separation of powers." That is to say, certain questions of legislative policy that arouse a wide general interest are being removed from the control of the executive, and the cabinet is being relieved of responsibility for their decision. This important change is taking place without the assistance of anything like what Americans call a "constitutional amendment" and indeed without any legal change at all. Such a process is entirely in harmony with the political tradition of Canada. Under the British tradition which we have inherited the most vital changes in constitutional practice are frequently brought about a process of gradual development without any alteration in the text of the constitutional law. We have already seen that the attempt to make the referendum an integral part of the constitution of Manitoba was defeated by the ruling of the courts. As a manner of fact, experience shows that the new institution will probably gain a firmer footing if it rests upon the support of public opinion and tradition than if it is based upon a purely legal sanction.

Since no hard and fast rules can be laid down by law for resort to the referendum in Canada, it seems probable that its use in actual practice will be characterized by considerable elasticity. Hitherto it has only been applied to the solution of questions concerning the liquor traffic. In Canada, as in the United States, there is a reluctance on the part of the older political parties to commit themselves corporately to any definite policy upon this problem, and the referendum therefore offers a convenient method by which the party leaders can obtain a settlement of the question without committing their party to a line of action that may prove to be unpopular. In all probability the general development of the referendum in Canada will be largely determined by similar considerations. The question whether any particular issue should or should not be submitted to a vote of the people will in all cases be one to be judged according to the discretion of the ministry in power, and in exercising that discretion the ministers will inevitably be guided to a large extent by considerations of party interest.

The Canadian people have never acquired the American appetite for elections, and it is only on comparatively rare occasions that the Canadian voter is called to the polls. As things stand, he is probably called to vote about once in every four years for the Dominion Parliament and perhaps once in every three years for the provincial legislature. Municipal elections usually occur annually, but they are not generally contested along party lines, and in many cases the candidates are returned unopposed, if their conduct has given general satisfaction. The election and "recall" of executive officers finds no place in our political system, nor have we any organization of "primaries" to duplicate the final elections. It may therefore be safely assumed that the development of the referendum in Canada will be very gradual, and that it will always be regarded as an exceptional rather than as a normal method of settling political controversies. In practice we shall doubtless find that it will only be invoked for the decision of special questions exciting a wide general interest upon which the organized parties are unwilling to commit themselves to a definite opinion.

The root cause of the demand for the referendum is the same in Canada as it has been in the United States. In each of these two countries, as in many others, there is a widespread and growing feeling that elected assemblies are not to be relied upon as truly representative of the popular will. In other words, the people wish to express their direct judgment upon certain issues without the intervention of a medium which is sometimes found to be distorting. We are living in an age when representative institutions are essentially upon their trial, and it may turn out that the referendum will prove to be a valuable safety-valve for the outlet of feelings that might otherwise take a revolutionary form. If it is to serve this purpose effectively it is essential that the policy of invoking the judgment of the people should not be abused or overdone. There is a real danger lest the referendum should be allowed to degenerate into an ordinary piece of political machinery, manipulated by professional politicians for personal or party ends. I venture to think that in some respects the modern passion for multiplying elections has proved to be the worst enemy of true democracy, since it places the real control of power in the hands of the professionals who manage the elections. The only way to preserve the referendum as a true safeguard of democratic government is to insist that it shall be used sparingly and occasionally for the decision only of those few great issues upon which alone the people are competent and desirous to express their considered judgment.

Sudden Mortality Among Russian Judges

"The soviet supreme court has, after twenty-seven hours of deliberation, condemned to death seventeen former judges, court officials, lawyers and persons connected with the operation of the new economic policy who had been tried on charges of corruption and bribery. The bribery charges concerned the fraudulent granting of legal immunity to prisoners. Sessions of the court were held in the sumptuous hall of one of the imperial palaces in the presence of a great crowd."—*Press Despatch from Leningrad*, May 26.

A UNIQUE AND UNFAMILIAR CHAPTER IN OUR AMERICAN LEGAL HISTORY

The Late Associate Justice Joseph P. Lamar, of the United States Supreme Court, in an Address to the Georgia Bar Association in 1907 Told How Georgia Attempted to Do Without a Supreme Court from 1776 to 1846—A Unique and Instructive Experiment with the Workings of Which This Generation is Almost Wholly Unfamiliar*

GEORGIA had been a State for seventy years before it had a Supreme Court. Georgia alone of any American commonwealth had a judicial system without an Appellate Court. Georgia alone had no tribunal to correct errors affecting the rights of the private citizens, and Georgia alone of any Anglo-Saxon State attempted for many years to conduct government without a supreme judicial tribunal necessary to preserve uniformity in the administration of justice.

It was a novel and untried experiment in Statecraft. It continued for more than half the period Georgia has been a State, beginning with 1776, when it was thinly settled, and continuing until 1846, when it had become populous and began to be called the "Empire State of the South." It was not accidental, but intentional, and in pursuance of a definite public policy. It furnishes a rare fact in history, worthy of study by the student of political affairs.

It was a unique experiment with the workings of which this generation is almost entirely ignorant. No record of it is to be found in any of our historical works. Nothing has been written of it even in essay or pamphlet, nor can the facts be discovered without a careful winnowing of forgotten records. A line here, a line there; an extract from the message of a Governor; a passing remark in a decision; a sentence in a biography, and such like scarce and stray threads must not only be woven together but pieced out by oral traditions in order to present anything like a consecutive history of the causes which so long delayed the organization of the Supreme Court.

Sparseness of population had nothing to do with it; for, before the Revolutionary War all the colonies, thinly settled as they were, had fairly developed judiciary systems under which there was the right of appeal to the Governor in council, with the further right, where the amount was sufficiently large, of appeal to the Privy Council in London.

Immediately after the Declaration of Independence twelve of the newly-created States had Courts for the correction of errors. These Supreme Courts had begun to publish their opinions, and before the year 1800, as many as thirty volumes of these early reports had been printed.

But there was nothing like this in Georgia. Neither of our three early Constitutions said anything about a Supreme Court. The Constitution of 1798 authorized the Superior Court to correct errors in, and to grant new, trials; but the new trials were to be granted and the errors were to be corrected in the county in which the action originated. But there was no appeal to any other or higher tribunal.

The next year after the adoption of the Constitution the Legislature passed the Judiciary Act of 1799, a Statute which had permanently affected and molded our whole system. It was the great work of great men. They endeavored to supply the deficiency in the Constitution by establishing a kind of Court for the correction of errors. The 59th section of the Act of 1799 provided that the Judges of the Superior Court should meet annually at the seat of government for the purpose of making rules and while they were thus in convention, the Judges were required to *"determine upon such points as may be reserved for argument, and which may require a uniform decision."*

This in effect would have been a Supreme Court composed of the Superior Court judges sitting in banc —somewhat after the fashion of the one then in South Carolina, and not essentially different from the Court of King's Bench in England and the Supreme Court of the United States, where the Judges of the Appellate Court are also Judges of the Circuit Court.

But this provision of the Judiciary Act was never allowed to become operative. So much of the Act of 1799, as required the judges to meet at the seat of government to make rules of court was allowed to remain in force, but the provision that they should there "determine cases reserved for argument" was repealed by the Act of 1801, and

> all points reserved for argument, and now awaiting a decision at the seat of government are hereby directed to be sent back to the respective counties from whence they have been sent, to be there decided by the presiding judge.—Watkin's Digest 39 (1), 708 (59); Clayton's Digest 38 (3 and 4).

So that, what the wisdom of the authors of the Judiciary Act of 1799, had attempted in creating, at least, a statutory Supreme Court, was destroyed by the Legislature of 1801, and the State was led to a continuation of an experiment that, in the end, proved to be an admitted and pronounced failure.

At that early day it seems to have been considered that the main purpose of a Supreme Court was to grant a new trial, and hence that there was no necessity for a Court of Review to bring about this result, since the statute gave the right of appeal by which one new trial could be obtained as a matter of course. This new trial was to be before a special jury and sworn to find according to the equity of the case. The appeal system worked so satisfactorily that at first it furnished one of the main arguments against the establishment of a court for the correction of errors. This appears from

*History of the Establishment of the Supreme Court of Georgia: Address delivered before the Georgia Bar Association at its Annual Meeting in 1907, by the late Associate Justice of the U. S. Supreme Court, Joseph P. Lamar.

the message of Governor Gilmer in 1830, who, in recommending the amendment, says that:

> The continuance of the present imperfection of the organization of our courts has, in a great degree, resulted from this perfection of jury trial.

The public mind of the entire country was hostile to all courts, and especially to Supreme Courts. The opposition was fanned at home and abroad, from State as well as federal sources, and it was particularly acute in Georgia, which was then being sued by Chisholm, and where the State was denying the jurisdiction of the Supreme Court of the United States. Out of the conflict precipitated by the decision in that case came the eleventh amendment to the Constitution of the United States, denying to a private person the right to sue a State.

The antagonism to appellate tribunals thus engendered was kept alive in Georgia by the litigation in the United States Supreme Court, growing out of the efforts to quiet the title to the Indian lands in North Georgia, and the heated discussion which arose when the writ of error was served on the Governor in the case of the Indian "Corn Tassel," who had been convicted in the State Court for the murder of another Indian and sentenced to death, and the subsequent litigation known as the Case of the Missionaries, in which Georgia refused to appear when served with a writ of error, and in which she had the support of President Jackson against the mandate of the Supreme Court.

But while the majority of the people were in favor of purely local courts, State as well as federal, and during the first three decades were opposed to the organization of a State Supreme Court, many realized the necessity therefor, and that part of the Act of 1799 which authorized the judges to meet and make rules of court, was again laid hold of as a means to constitute what was called a "Convention," but what was, in effect, a voluntary Supreme Court, where the principles of law could be at least informally discussed and agreed on, and where the trial Judge could return home and render a formal judgment in the county in which the case had been tried, thereby obeying the letter of the Constitution which required the errors to be corrected in the county in which they had been committed.

Under this statute the judges met annually to revise the rules. It was natural for them to submit to each other difficult and important questions which each then had under consideration. They probably discussed rulings which they themselves had already made, and in which they often found they had differed one from another. They no doubt fell into the habit of discussing these matters, and would be influenced by the views of one another, and for the sake of uniformity, would sometimes yield to the informal views expressed by the majority. The consequence was that these annual meetings, these informal discussions, and the adoption of the views of the majority, began to have something like the force of custom, if not of law, and as the judges were at first required, and subsequently permitted to alternate, they also occasionally presided with one another in banc on circuit in the trial of specially important cases.

Inasmuch as this convention was voluntary, no record of its proceedings was kept, and indeed, only two allusions to it prior to 1830 had been found, one in the message of Governor Forsyth, in 1827, and the other in the Resolution of 1815, from which it appears that the judges met at Augusta in convention in 1815.

What they did then may have been exceptional, or it may have been a common practice. At any rate, when the constitutionality of the "Alleviating," or what we would now call "Stay Law," was under consideration, Judges Berrien, Walker, Gresham and Harris met in convention in Augusta, and after argument the trial judge in a decision of marked ability, pronounced the State statute unconstitutional because violating the provision of the Federal Constitution against impairing the obligation of a contract.

At the succeeding session of the General Assembly, the House passed a resolution which I have once before read to you, but which will bear partial repetition, because it is an authentic instance of circuit judges sitting in a voluntary convention:

> WHEREAS, John MacPherson Berrien, Robert Walker, Young Gresham, Stephen W. Harris, Esquires, judges of the superior court of this State, did on the 13th day of January, 1815, *pretending to be in legal convention and assuming to themselves, being so assembled*, the power to determine on the constitutionality of and binding efficiency of laws passed by the General Assembly, and did declare certain Acts of the Legislature, in their decisions named, to be unconstitutional, and
>
> WHEREAS, *The power of the judges so to convene is absolutely denied, etc.*
>
> *Resolved*, That we view with deep concern and regret the aforesaid conduct of the judges and cannot refrain from expressing our entire disapprobation of the power assumed by them of determining upon the constitutionality of laws regularly passed by the General Assembly. . . . Yet we forbear to look with severity on the past, in consequence of judicial precedents, calculated in some measure to extenuate the conduct of the judges, and hope that for the future this explicit expression of public opinion will be obeyed.

The records are so incomplete as to make it impossible to say what was the immediate result of this resolution in breaking up conventions, or trials, before the judges in banc. Governor Forsyth's message, in 1827, seems to refer to conventions as an existing institution, *"which have been required"* and which he suggests might be further clothed with powers analogous to those of a court for the correction of errors. One thing is certain, the condemnatory resolution of 1815 did not permanently prevent the judges from meeting in convention. In 1830 William H. Crawford, who, after his retirement from national affairs, was elected judge of the Superior Court, issued a call which shows that it was the result of formal action by the judges in convention. From Judge Crawford's published call, and from the Preface to Dudley's Report, it appears that the judges had agreed to sit in convention,

> To secure the beneficial results of uniformity in the administration of law, as well as to insure greater deliberation and research in the adjudication of doubtful questions, various efforts have been made by the best and wisest men among us to effect such a change in our Constitution as will give us the benefit of a Court of Errors.
>
> Without invading the Constitution, or doing violence to a single provision of the laws, the judges, in November, 1830, regardless of the additional expense and trouble of advising with each other, and discussing freely and fully all questions of a doubtful and complex character which might arise before each in their respective circuits, and thereby to *enable each judge to decide*, such question in the law of the united wisdom of the whole Georgia bench.
>
> And though decisions thus made may not fully atone for the want of a Court of Errors, they are made under the most favorable circumstances to command respect which the Constitution and laws of the State would authorize at the time.

From Dudley's report of these cases it will be seen that the names of counsel are not given, and it is probable that the convention did not ordinarily hear arguments. They sometimes considered briefs, for Chief Justice Lumpkin, in Carey vs. Giles, 9 Ga. 260, refers to "the printed brief of S. S. Bailey, Esq., submitted to the convention," which shows that this voluntary as-

sembly had reached a point where it was recognized as an integral part of the judicial system.

From tradition, biographical sketches, the two volumes of Georgia decisions—Dudley's Reports and the invaluable reports of Judge R. M. Charlton, and Judge T. U. P. Charlton—we know that whatever may have been the defect in the judicial system, there was no lack of ability on the bench.

The very fact that the judge had so much power and responsibility, had its natural effect. It attracted able men to the bench, and stirred them to the highest endeavor.

After 1830, the convention of judges was presided over by no less a man than William H. Crawford, who had been Secretary of the Treasury, Minister to France, and the nominee of his party for President of the United States. And Chief Justice Lumpkin, in Carey vs. Giles, speaking of this convention, says that the bench was then "ornamented by men whose ability has never been equalled in any period of the State's history." In the Preface to Dudley's Report, he says that "the opinion in Wakeman vs. Roach (by Judge Law), and Brewster vs. Hardeman (by Judge L. Q. C. Lamar, Sr.), might be placed on a level with the best productions of the American or English Bench," and Judge Nisbit, in Wilder vs. Lumpkin, 4th Ga. 219, paid a similar high compliment to another decision by Judge Law.

But no matter how able the bench, the convention was no substitute for a Court for the Corrections of Errors, for there was no right to a writ of error, and only those cases were referred to it in which the trial judge had doubt. Where he was satisfied of the correctness of his decision, he did not take the opinion of the Convention and there was no remedy to the injured party.

Still the Legislature granted no relief. It is probable the unifying work of the convention, in some measure, lessened the need of the Supreme Court, so, session after session, the message of the Governor called on the General Assembly to amend the Constitution so as to provide for the creation of a Supreme Court. Session after session a bill for this purpose was regularly introduced, and as regularly defeated.

There are no reports of the debates extant, and the journalism of that day does not furnish information as to the specific arguments which were urged against giving Georgia a court which every other State deemed absolutely essential to the perfection of a judicial system. There was one speech which, if we had it, would tell us what the arguments were; for it is said that when Eugenius Nisbit was in the State Senate he introduced the bill to amend the Constitution, and in its support, made his most celebrated speech. He took up seriatim the objections to such tribunals, and answered them one by one. At the request of the Senate, his speech was published, but after a most diligent search and extensive correspondence, a copy can not be found. This is a great loss, for it would be interesting to see what was put forward by the opposition; still here and there we can discover some of the points made against a Supreme Court.

Governor Gilmer, in his "Georgians," says that: "The Virginia settlers had a distinct recollection of the great delay in the decision of cases by the Courts of Appeal of Virginia. They therefore opposed the measure, and as long as their influence was controlling in Georgia politics, prevented the adoption of the constitutional amendment."

Sparks, in his "Memoirs of Fifty Years," attributes the opposition to the amendment to the fear that the effect of establishing a Supreme Court would be to abolish special juries.

In addition to the fear of delay, and the desire to preserve special juries, there were other arguments which rather added to the detail than to the spirit of the opposition. From one of the Governor's messages we learn that it was said that "if one judge could err, so could three." Another indicates that it was objected against the Court that it would be necessary to have a reargument and this would be an additional and useless expense upon litigants. It was further contended that the Bar would have to go to the Court; that this would be a burden upon the parties. Then, too, the game of politics was played, and those who might otherwise have been in favor of the Court were opposed to it if their party happened to be in the minority when the question was under consideration.

These were some of the considerations urged against the amendment. Let us look on the other side, and see what were the arguments in favor of the creation of a Court for the Correction of Errors.

It is here that we find curious facts of a distinct historical value, for, in considering this side of the question, we pass out of the domain of supposition, discover the system in actual operation, and may learn how this novel experiment worked. We can see the practical effect of administering justice, even before able and upright circuit judges, without a Supreme Court.

A judicial system with an Appellate Court is so much a matter of course that few, if any, have ever considered what would be the condition of affairs without such a tribunal.

Probably nine men out of ten would think that the main purpose of such a Court was to correct errors which had, in some way, impaired or denied the rights of a private litigant. And yet the records show that between 1810 and 1845, the strong and reiterated argument for such a Court was its value to the general body of the public. Governor after governor attacked the system on the ground that it produced not only infinite confusion, but positive conflict in the law, harmful to the litigant, but more harmful to the public.

We look at our Table of Overruled Cases, and are prone to criticise the length of that list, forgetting how infinitesimally short it is by comparison with the enormous number of points that have been decided, and of rulings that stand unquestioned. The number of overruled cases is much less than one-tenth of one per cent of those decided. But if this list, short as it is, be objectionable, what think you of a condition where a legal principle was in a constant state of flux; where it was announced, overruled, reannounced, reoverruled, and finally so set at large that no lawyer could safely give an opinion to a client as to what was the law. For example, at one time, one-half of the circuit judges held that a particular statute on the subject of certioraris was constitutional, and the other half held that it was unconstitutional. A ruling rigidly followed in one circuit was totally disregarded in another. The uncertainty was multiplied, because a principle once announced in a particular circuit by one judge would be disregarded and not followed by his successor; so that it was not so much a question of the length of the Chancellor's foot, as how long he would be Chancellor.

Though the messages of the Governor are evidently couched in restrained and repressed language, it is no exaggeration to say that the situation was intolerable. Nor is this any necessary reflection upon

the law; for while no man can deny that it has uncertainties, and no one will dispute that there are many doubtful and debatable questions, yet, it is possible for the Courts of the State to accept one of the debatable views and by a strict adherence to it, and to its logical results, bring certainty out of doubt. This is really one of the silent, unconsidered, yet most valuable functions of a Supreme Court. Not that it is infallible, but that it can authoritatively settle disputed questions and make uniform a law that might be differently and variously decided by the ablest and most upright men on the Superior Court bench.

That the absence of a Supreme Court resulted in uncertainty, confusion and conflict, and that the want of uniformity was a great and crying evil, will appear from some of the few utterances of that date which have been left on the printed page. The first recorded complaint is found in the message of Governor Mitchell, in 1810; the last in that of Governor McDonald, in 1845. Between these dates the messages of Governor Troup, Governor Forsyth, Governor Gilmer and Governor Schley emphasize, amplify and repeat the demand for uniformity.

To show that the deplorable state of affairs indicated above is not an exaggeration, it will only be necessary to make one quotation, since the message of Governor Forsyth, in 1827, seems to sum up the whole matter, and to present it in a vigorous and convincing manner, which leaves nothing more to be said:

> The condition of the judiciary requires your most serious attention. Under the present arrangement of eight judges of the Superior Court, each confined to the circuit for which he is elected, supreme in his authority, not bound by the decisions of his predecessors or his contemporaries, and not aways by his own, which will be in turn disregarded by his successors, there can be neither uniformity nor certainty in the laws for the security of the rights of persons or property. . . . The confusion produced by contemporary contradictory decisions every day increases; property is held and recovered in one part of the State, and lost in another part of the State under the same circumstances; rights are asserted and maintained in one circuit and denied in another, in analogous cases.
>
> We have all the judicial machinery for the correction of erroneous judgments. Appeals, writs of error, motions for new trials, are used as if in mockery—since the appeals are tried, the writs determined, the motions decided by the same judge whose erroneous judgment is to be corrected, arrested or set aside. All the delays of the English system are permitted; but *time* only is gained or lost, unless indeed the presiding judge has a mind of extraordinary vigor and magnanimity, capable of discovering and prompt to confess its errors, or death or a new election removes him from his place. The destruction of this judicial octarchy by the substitution of a single supreme judge, whose decisions should govern all the circuits, would be an important improvement. It is not necessary to vest such tremendous power in the hands of one individual. The object can be accomplished by a less dangerous means. The most simple and obvious remedy is the establishment of a court for the correction of errors. This remedy can not, in my judgment, be applied without a change in the Constitution, which requires that errors should be corrected and new trials determined by the Superior Court of the county in which the action originated. *Under this clause of the Constitution, however, conventions of the judges have been required, and in these properly regulated,* a palliative may be found for the existing disorder, until a radical cure can be effected by a change in the Constitution.

These, and similarly powerful arguments seem to have had no effect. While a bill was regularly introduced to amend the Constitution so as to provide for a Supreme Court, it was as regularly defeated. As the practice then was, the Constitution was not amended by a submission to the popular vote, but the bill had to receive a two-thirds vote of each House for two consecutive years. As far as we can see, the bill never received a two-thirds vote at any one session, even in one House, until 1835, when, by great good luck, it passed, and was concurred in at the succeeding session in 1836; and at last, exactly sixty years after Georgia became a State, the Constitution provided for the creation of an Appellate Court.

But the amendment did not bring relief. It was natural to suppose that an Act to carry the Constitution into effect by organizing the Court and electing or appointing Judges would at once be passed. Such was, no doubt, the general impression of the people, and of the members of the Legislature. Indeed, the Appropriation Bill for 1837 actually provided for the salaries of the Judges and Reporters of the Supreme Court. But this was a striking example of counting chickens before the eggs were hatched, for later in that session the bill to organize the Court itself was defeated, and Georgia had yet to struggle for ten years to secure the Court which the Constitution required.

This is one of the extraordinary facts in the history of our legislation—more remarkable even than the original failure to provide for an Appellate Court. For here the opposition to the Court was actually able to defeat the Constitution itself which required such a Court. All of the old arguments against amending the Constitution were repeated against the bill to establish the Court, and all of the old arguments in favor of amending the Constitution were urged in favor of its organization.

The opponents were no doubt sorely pressed by the view that the authority to create was equivalent to a direction to organize, and also by the growing realization of the necessity for a more uniform administration of the law.

The Act of 1841 was a tub to the whale. It required that the Judges of the Superior Court "write out in a fair and legible hand their decisions in full in all cases for motions for a new trial, whether granted or rejected," and to send the written decisions to the Governor, who was required to publish such of them as were of general interest to the public. To that Act, we are indebted for the two volumes called Georgia Decisions, and the curious reader may note at the end of the first opinion, an order by Judge Schley that: "The Clerk will enter this decision on the Minutes of the Court, and forward the original to the Governor of this State as the law directs." It appears from the message of Governor McDonald, that these reports gave little or no satisfaction, and the contest for the enforcement of the Constitution by the establishment of a Court for the correction of errors continued.

There is probably no parallel in our legislation to the continued refusal of the Legislature to give us a Court called for by the Constitution. We can infer that the argument was used that the amendment, though adopted in strict accord with the constitutional requirements, did not in fact represent the will of the people, and that this *unwritten* law was put above the demand of the Constitution itself. It gave rise to one of the earliest referendums. We find on December 2, 1841, the General Assembly adopted a joint resolution which had been introduced by Peter Cone of Bulloch county, that:

> WHEREAS, It is the duty of the Representatives of the people to conform to their wishes, and
>
> WHEREAS, Doubt exists relative to the will of the people of Georgia in relation to a Supreme Court for the correction of errors; therefore be it
>
> *Resolved*, By the Senate and the House of Representatives of the State of Georgia, That the people be, and they are, hereby *requested* to endorse on their tickets, "Court or no Court" at the next annual election for members of the

> Legislature, and the managers are hereby required to transmit a statement of the votes polled for and against the said Supreme Court.

Considering the spirit of the times, you will not be surprised to hear that "No Court" had a majority of about 6,000, and with this adverse popular vote it did seem as though the fate of the measures had been finally sealed for that generation.

But its friends pressed the question, and Governor McDonald, in 1842, undertook to analyze the returns. In his message he says:

> The popular vote in regard to the establishment of a Court for the correction of errors, can not be taken as decisive evidence of the opinions of the people on that subject. Not one-half of those who attended the polls cast their votes for or against the measure. Of the minority who did vote, there was a majority of six thousand and ninety-one against it; thirteen thousand eight hundred and thirteen voting for, and nineteen thousand nine hundred and four against it. From the general apathy and indifference which prevailed in regard to the question, it may be safely inferred that the people are content that their representatives carry into effect the Constitution.

And so the contest continued until at last in 1845 there was a fair prospect of passing the bill and the Legislature entered upon the task of perfecting it, of removing objections and compromising apparently irreconcilable views. Some of these objections, with the statutory answer thereto, have resulted in leaving a permanent impression upon the Constitution and practice of the Court.

It was said that there would be delays similar to those which had characterized the old Court of Appeals of Virginia; that the Court, like all other Supreme Courts, would soon be behind in its business. This was met by a provision that has subsequently been crystallized in the Constitution, that cases should be disposed of at the first term.

It is also a matter of tradition that what now appears to be a humorous argument was seriously urged. Some of the too hopeful friends of the measure contended that the Court need not be permanent. That in ten years, at most, it would settle all doubtful questions and could then be abolished. In view of the fact that sixty years later the Supreme Court of Georgia was annually deciding more cases and more new questions than any other Court of review, this argument should be embalmed as the greatest of judicial jokes.

There is a tradition that one or two Judges of the Superior Court opposed the bill though it was supported by the balance of the bench.

In that day when means of transportation were so inconvenient and it was a question as to whether "the mountain should go to Mahomet or Mahomet should go to the mountain," the question was settled in favor of the Bar, the Court being made peripatetic. The State was divided into five districts and two terms were annually held in each district.

Of course the argument of expense to the State and expense to the litigant was vigorously pressed. Some of the opponents were of the opinion that litigants ought not to be put to the expense of having to employ counsel to reargue the case in the Supreme Court, and Governor Troup, who strongly favored the Court, had himself taken that position, saying:

> The argument is good for nothing. The parties before the Court want not the argument; they want a decision. And if the Judges can not decide correctly without a labored rediscussion of the questions, not by themselves, but by others, who ought not to be their superiors, such a Court will only be an evil, by the amount of unnecessary expense incurred.

Governor Troupe's biographer dissents from this view of his hero, and it evidently did not find general favor. On the contrary, when the Court was finally organized, it enacted a rule far more liberal than anything which the Bar now demands or the rules permit, for by it "the plaintiff was *required* to read all the authorities upon which he expected to rely in his opening argument," and there was this further remarkable provision that "no cause shall be argued by brief alone."

Of course the question as to who should be on the bench, and to what party they belonged, was an important fact. That, too, was finally compromised by an agreement that two should be Whigs and one a Democrat. The bill was approved December 10, 1845, and the court held its first session January 26, 1846. Georgia had at last adjusted her judicial system to the model of her sisters, and seventy years after the Declaration of Independence had made her a State, she organized a Supreme Court.

We may catch a glimpse of the depth of feeling and satisfaction with which it was received, from an incident recorded by Miller in his sketch of Judge Strong, who had been on the bench of the Superior Court, and once a member of the Convention of Judges. Judge Strong said, at the conclusion of his first argument at the first term:

> May it please your Honor, my experience at the Bar dates back nearly forty years. I thank God my life has been spared to this hour to behold a tribunal for the correction of errors. I can adopt the language of one of old, with slight variations, and say: "Now lettest Thou thy servant depart in peace, for mine eyes have beheld the salvation of the judiciary of Georgia."

Even after the organization of the Court, the opposition was not silenced and no one felt sure of its continuance, for, as pointed out by Chief Justice Lumpkin, it was well known that many compromises had to be accepted; therefore, the bill contained inherent defects well calculated to insure its miscarriage. "Who," he asked, "was willing to risk what little reputation he might have acquired by a lifetime of toil, to be crushed beneath the ruins of a fallen fabric?"

And such, indeed, might have been the end had it not been for the extraordinary fitness and ability of the men first selected to preside over this Appellate Court. It was Georgia's supreme good fortune that three such men as Lumpkin, Warner and Nisbet were summoned to this task. They were in a position to influence, as no other Judges have ever been, the jurisprudence of their State. Conditions were plastic. The very fact that there had been so much want of uniformity in the past gave them a free hand. They were unhampered and unfettered by narrow and binding State precedents. They had the whole field of the law from which to choose, with the right to select that which was best, and to discard what was narrow or contracted.

They were very far, however, from letting this liberty degenerate into a license, where they could make law or change law, or follow their personal ideas as to what the law ought to be. That would have been to sacrifice the people to the individual litigant. That course would have destroyed that fixity of the law which is its prime value. For the public are interested not only in the adjustment of the right between the two litigants, but infinitely more interested in having the law so fixed, impartial and impersonal, that men may act thereon in advance when they make contracts, with the certainty that the law as it existed when the contract was made, will be enforced when the contract

is to be construed and will not be changed because of individual hardships or for special reasons.

Lumpkin, Warner and Nisbet, the first Justices of the new Court, were each men of extraordinary ability and marked individuality, differing widely in gifts and talents, but agreeing in their love of law and in their passion for the administration of justice according to fixed and settled principles. They steered with a firm hand the middle course between the two extremes of excessive technicality and undue license, and early laid down principles by which procedure, law and equity were settled on the foundations of sound reason, good sense and practical experience.

For the first year or so, the new Court had comparatively few cases. This enabled the Judges to allow almost unlimited times for oral argument, and, as you have seen, the early rules not only permitted, but *required*, the plaintiff in error to read all the authorities on which he relied, and prohibited any case being argued by brief alone.

We can get some idea of how the lawyers of that day availed themselves of this liberty of oral argument. In Thornton vs. Lane, the Court said:

> In this case we have listened patiently, at least, if not with unmixed pleasure to eight elaborate arguments occupying more than as many days.

But as things went in those times that was not unusual. For we learn in the Life of Judge Story that it was not uncommon for the argument of a case in the Supreme Court of the United States to consume quite as much time; and in a note to Price vs. Watkins, it is said that Mr. Dallas, afterwards Secretary of the Treasury, "was a lawyer of inexhaustible eloquence—and a speech of two, three or even four days was not an unusual effort with him." But the point is that in the early days the Court had ample time to listen and ample time to consider.

Their decisions show the most thorough study, the most laborious examination and citation of authorities, and a discussion of underlying principles, in which conflicting views were reconciled if possible, and where the conflict was irreconcilable, a determination to select that line of authorities which the experience of the Mother Country and of the American States had demonstrated was best calculated to serve in the practical affairs of men.

Almost immediately order began to come out of confusion, and uniformity out of conflict. The result was that the people, from having been bitter in their opposition to the Court, came to have for it the highest regard and expressly retained it in the Constitutions of 1866 and 1877. They went further. The Convention of 1877 reversed the spirit of the resolution of 1815, which denied the power of a Court to declare an Act of the Legislature unconstitutional, and, in express and explicit terms, conferred this power on the judiciary. This is a provision peculiar to Georgia, for while in other States, and in the United States Courts, the power to declare an Act unconstitutional is supported by weighty and conclusive arguments, it is at least an implied power. But in Georgia, the Constitution of 1877 takes the question out of the domain of argument and in explicit terms declares that:

> Acts in violation of this Constitution, and of the Constitution of the United States are void, and the Courts *shall so* declare.

But there is even a stronger evidence of the favor with which the Court soon came to be regarded. From bitter opposition, the pendulum swung to the extreme of approval, and in twelve years after the Court's organization, the people were so well satisfied with the results of uniformity as opposed to the previous conflicts, that the Legislature declared that a decision by a full bench should not be overruled even by itself. And this paper can not better conclude than by quoting a provision in the Act of 1858, the like of which can not be found in any other State, in which the Legislature voluntarily declared that "a decision of the Supreme Court shall be observed by all Courts as the law of the State and shall have the same effect as if it had been enacted by the General Assembly."

Review of Recent Supreme Court Decisions

(*Continued from page 482*)

applies to divisional applications and can only be avoided by proof of special circumstances justifying a longer delay.

The case was argued by Messrs. Albert G. McCaleb and Lynn A. Williams for petitioner, and by Mr. Charles L. Sturtevant for respondents.

Patents.—Inventions by Employee

Patents on inventions made by one employed and paid for that special purpose belong to the employer.

The *Standard Parts Company, Petitioner* v. *William J. Peck*, Adv. Ops. 317, Sup. Ct. Rep. 239.

The owner of the patent sued for infringement. The defendant company, admitted the use of the devices of the patent, but alleged they were constructed under the supervision of the patentee under a contract between the patentee and defendant's predecessor in business. Defendant also filed a counterclaim averring that the invention was made by the patentee while in the employ of its predecessors in business.

The District Court held that the property in the invention belonged to the employer, and that this property passed to the defendant when it acquired the assets of the employer, and that plaintiff holds the legal title in trust for the defendant.

The Circuit Court of Appeals reversed the decree of the District Court which had decreed an assignment and transfer of the patent in suit and other patents and applications from plaintiff to the defendant. The Circuit Court of Appeals decreed that a license existed in the defendant in the machines, holding that six (6) were made prior to the application of the patent and were "wholly free from the monopoly of the patent" under provisions of Revised Statutes Section 4899. As to four (4) other machines the court held that the license to construct them was not assignable and could not pass to the defendant by the ordinary purchase and sale of the business.

The court granted its writ of certiorari, commenting on the fact that the courts reached different rulings because of different readings of the cases.

The opinion of the court was by Mr. Justice McKenna.

The learned Justice reviewed the evidence which showed that defendant's assignor had a problem in its manufacture and employed the patentee

to work out the problem. The patentee was engaged to "devote his time to the development of a process and machinery," and was to receive therefore a stated compensation. This property, said the learned Justice, would go to him

> who engaged the services, and paid for them, they being his inducement and compensation, they being not for temporary use but perpetual use, a provision for a business, a facility in it and an asset of it.

Any other meaning of the contract of employment would confuse the relation of the parties to it and take from the manufacturer the inducement he had to make it—take from the manufacturer the advantage of its exclusive use and subject the company to the rivalry of competitors.

The court reversed the Circuit Court of Appeals holding with the District Court that

> . . . while the mere fact that one is employed by another does not preclude him from making improvements in the machines with which he is connected, and obtained patents therefor, as his individual property, yet, if he "be employed to invent or devise such improvements his patents therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

The case was argued by Messrs. Bert M. Kent and A. V. Cannon for petitioner, and by Mr. George L. Wilkinson for respondent.

Patents

The State Patent for the making of the outer shoes or casings of Pneumatic Automobile Tires held invalid.

Great commercial use is persuasive of novelty and utility but must be weighed in the light of all the circumstances.

The John E. Thropp's Sons' Company, Petitioner v. *Frank A. Seiberling,* Adv. Ops. 430, Sup. Ct. Rep. 346.

Plaintiff, as assignee brought suit on two patents for the making of the outer shoes or casings for pneumatic automobile tires composed of woven fabric treated with rubber. In 1914 plaintiff filed suit against the John E. Thropp's Sons' Company, in the District Court of New Jersey. In the same year he filed suit against the Firestone Tire and Rubber Company in Ohio. The District Judge in the Firestone case found both patents valid and infringed. On appeal to the Circuit Court of Appeals for the Sixth Circuit the decree of the trial court was reversed.

After the decisions in the Sixth Circuit in December, 1918, plaintiff filed in the Patent Office a disclaimer as to certain claims of one of his patents. No proofs were taken in the New Jersey case to sustain suit on the two patents. The District Judge dismissed the bill in the New Jersey suit on the ground that the effect of the disclaimers of the State patent was to change it from a machine patent and to make it a method or process patent, and that the method was old. On appeal to the Circuit Court of Appeals for the Third Circuit the court held that the record in respect to the first patent was substantially different from that in the Sixth Circuit, and that the first patent as qualified by the disclaimers was valid and infringed. The Supreme Court issued its Writ of Certiorari because of the conflict of opinion between the Circuit Court of Appeals of the Sixth and Third Circuits.

The opinion of the court was by Mr. Chief Justice Taft.

After referring to the earlier processes of making tire casings, and the prior art the learned Justice said:

> The change from hand to the use of machinery often involves invention. In the making of tires, it has in fact resulted because of the use of power, in speed of manufacture and possibly in some greater uniformity of the product. But the record does not show that there has been substantial change in the mechanics or method of making. The steps are the same and the succession from one to the other are as in the manual art, and the transfer from hand to power was by the usual appliances and had all been indicated before the State patent.

The learned Chief Justice comments on the view of the Circuit Court of Appeals for the Third Circuit which attributed much importance and novelty to the effect of the centrifugal force of the patentee's revolving core upon the fabric.

After a review of the record the Supreme Court could find no such result.

The owners urged that many millions of tires had been made under a license granted by the plaintiff, and that the success of the device shows the utility and novelty of what he licensed. Against this contention the opinion points out that the patents themselves made large and sweeping claims which were well calculated to induce acquiescence by those without sufficient knowledge of the prior art or adequate capital to resist.

The owner, when these licenses were granted was at the head of the great Goodyear Company. He could give great vogue to a device owned and used by him. The license was not a heavy tax, equal to less than one per cent of the cost of a machine, and purchase of peace was a wise course for the smaller manufacturer.

"Evidence of this kind is often very persuasive, especially when patentable novelty is in doubt," said the Chief Justice, "But it is by no means conclusive and must be weighed in the light of all the circumstances, to accord to it its proper significance." The effect of this rule was not deemed sufficient to overcome the lack of novelty and invention.

The court found it unnecessary to pass on the contention that disclaimers filed by the owner in the Patent Office exceed the legal function of disclaimers, and were an attempt to change a mechanical patent to a process or method patent inasmuch as it failed to find invention of the State device either as a mechanical or as a method patent.

The case was argued by Mr. Livingston Gifford for petitioner, and by Mr. Melville Church for respondent.

Baneful Effect of Golf on Lawyers

"To a young lawyer it is death to his ambition; to an old one it is stagnation, and to his partner, vexation. This is no idle jest, but the fruit of bitter experience. Both my partners are addicts, and I have watched their gradual depreciation under its baleful influence. The German mark isn't a circumstance. They talk about being 'behind in their golf,' while being 'behind in their work' gives them no concern; hence the note of tragedy in these mirthful remarks. Over every golf course should be inscribed the motto, 'Abandon hope all ye who enter here.' "—From address before Texas Bar Association, 1923.

LETTERS OF INTEREST TO THE PROFESSION

The Jury and Its Successors

BECKLEY, W. VA., April 2.—To the Editor: For many years conscientious lawyers have noted the growing inefficiency of the jury as the final and supreme arbiter upon issues of fact in both civil and criminal cases. Forty years ago, John C. Reed, in his very readable volume on "Conduct of a Law Suit," dealt with the frailties and foibles of the jury system. The last issue of the Journal carries a temperate and sensible article on this subject from a member of the California Bar. While some practitioners still acclaim the jury as infallible, the growing complexities of life and business render the average juror less able to cope with the issues and difficulties brought before him.

Various remedies have been proposed. But, before any remedy can be adopted, the vast force of passive public opinion must be interested and set to work for improvement.

One proposition is for the election or selection of permanent jurors. But, upon examination, as is well pointed out in the article above mentioned, a training and experience in legal principles and rules of evidence is necessary. The burden under present conditions requires all the attributes of the Judge.

Men of large business interests do not serve on juries as a practical fact. Men of small interests are caused serious loss by such service, and the question of better service and better results becomes daily more pressing. Much of the criminal activity for which we are justly infamous, comes from lax enforcement of law, which comes in turn from poor work in the jury box and room.

The final conclusion must be that the correct solution is a trial Court or body of men possessing training in the law sufficient to deal with questions of both law and evidence, and qualified to unite in its own body the functions now performed separately by Judge and Jury.

There are two difficulties to be considered: (1) The provisions of our written constitutions providing for jury trial as such, and (2) the other dealing with the item of expense.

Upon the question of expense, actual figures of allowances and expenditures for jurors are the best guide.

In my own County of Raleigh the amount paid out to petit jurors in the trial of civil and criminal cases for the year 1923 was $12,274; and in the U. S. District Court for the Southern District of West Virginia, for the same year, the amount was $15,357.40. The salary now paid to the Judge of the Criminal Court is $4,500 per annum; while the Judge of the Circuit Court for three counties receives $5,500; and the salary of the U. S. District Judge is $7,500.

Thus, it becomes apparent that the same amount of money as paid out for jurors would employ permanently three additional Judges trained in the law, besides relieving the body of business of the loss of time and money caused by the enforced service as jurors.

The great obstacle however is the inertia of the body politic. The Bar is the necessary leader in reforms of judicial procedure, and if any beneficial change comes, it must perforce come from those who best understand the evil and its remedy.

The jury panel is admitted to have weak and ignorant members. They are selected by two or three commissioners, without any personal acquaintance or investigation. Yet, these men so superficially selected, pass on matters of gravest moment, from property to life.

All other officials and wielders of such portentous powers must run the gauntlet of public appraisal and election or appointment. Why this exception in a Democracy? The jury was originally established to protect the people against aristocracy and tyranny. It has outlived its era. A Court of trained judges of law and fact would be far better fitted to do justice, and would be more critically examined before acting in this solemn function.

The Courts are criticized, but the Courts are part Judges and part untrained citizens chosen by lot, yet expected to handle the most delicate machinery of justice.

The verdict is at times a gross miscarriage of justice, and when this takes the form of acquittal of a felony, there is no remedy. The rights of the defendant would be fully protected by the requirement of unanimity in the decision.

Why should we discard all rules for safety and efficiency in this vital matter? Our system is a natural evolution from the original trial by battle, and almost as chancey.

Let us apply here the usual rules of human experience and conduct. The evil exists and is remediable. Let us remedy it then. Let the necessary Constitutional amendments be introduced, and the period of agitation, discussion and education will begin.

Let us begin.

ALFRED D. PRESTON.

Indigent Defendants and Defenders

Jefferson City, Mo.—To the Editor: In eighteen of the United States the members of the bar are still required to defend indigent criminals without fee, wherever appointed by the court to do so. Ten of the eighteen States which thus regard the legal profession as something in the nature of an eleemosynary institution are Southern States. The commonwealths which still visit this species of involuntary servitude upon their lawyers are Arkansas, Alabama, Mississipi, Georgia, Kentucky, Louisiana, South Carolina, Tennessee, Texas, Virginia, Utah, Arizona, New Mexico, Kansas, Illinois, West Virginia, New Jersey and Missouri.

In the thirty States where compensation is allowed the fee is usually so small as to amount to a merely nominal charge which does not even remotely approximate a fair return for the services rendered. Thus, in Oklahoma and North Carolina, the fee fixed does not exceed $25. In Wyoming, South Dakota, Colorado, Idaho and Florida not more than $50 is allowed by the court and paid out of the public funds for defending one charged with crime, while Delaware offers her lawyers the princely sum of $30. In Oregon the county courts are authorized to pay counsel fees in these cases.

but the general rule in that State is to require the lawyers to work for nothing.

In New York, Nebraska and Massachusetts alone is a fairly respectable fee usually fixed in capital cases. In New York the attorney appointed by the court to represent an indigent defendant charged with murder is allowed not to exceed $500. In Nebraska, in the counties which do not provide the office of Public Defender, the court is authorized to allow a fee of not to exceed $100, except in murder cases, when the fee is usually fixed at $500. Massachusetts pays fees to the defense in capital cases, and the usual allowance is $500. Next to these States in the size of the fee allowed in capital cases are Michigan, $250; Pennsylvania, $200, and New Hampshire and Maine each $150; while Nevada, Maryland, Ohio and Montana allow as much as $100 to an attorney appointed to defend a case of murder in the first degree. In Iowa and Indiana the fee is within the discretion of the court.

Six of the States pay the unfortunate defenders of still more unfortunate defendants, just as bricklayers are paid—by the day; excepting that bricklayers are paid higher wages. One is here reminded of Max Nordau's distinction between genius and insanity. "The lunatic," he said, "is at least sure of his board and clothes." The State of Connecticut allows her lawyers $5 per day when drafted to defend poor persons charged with crime—which is about the average wage of a hod-carrier. Washington allows $10 per day. Rhode Island, Vermont and North Dakota pay $15 per day—not quite so much as the wage of a brick-layer, but about the usual compensation of a plasterer. Wisconsin tops the scale with $25 per day for the time actually employed in trying a case. But it should be remembered that a "day" in labor parlance means eight hours; whereas in the trial of cases lawyers often work from 8 or 9 o'clock in the morning until 11 o'clock at night.

In only three States is the Public Defender beginning to function. These are Minnesota, Nebraska and California. It may occur to the casual observer that just here the American bar has a duty to perform. Unless justice is to be sold to the rich and denied to the poor, the bar should initiate legislation to take care of precisely this situation. Unless the individual attorney appointed by the courts are to be paid reasonable fees out of the public funds, it is plainly the duty of the bar to insist generally upon the creation of the office of public defender in every county in the Union. The system prevailing in a majority of the States, as will be noted from the foregoing summary, works a great hardship upon the lawyers; and in many instances it must necessarily work an even greater hardship upon the indigent defendant.

Sept. 13, 1923.

THOMAS SPEED MOSBY.

Bill Meets His Approval

Arkansas City, Kan., May 24.—To the Editor: I thank you for calling my attention in your issue of May, 1924, to the Caraway bill, which bill seeks to regulate and control the power of Federal Judges in the conduct of Jury trials.

My attention had not been called to this particular bill before, and the bill meets with my hearty approval, as it meets with the hearty approval of about 90 per cent of the lawyers who have been engaged in trials in the Federal Court. However, most of them do not have the courage to express their real convictions.

Too often the instructions of a Federal judge in a trial before a jury simply mean the closing argument on behalf of the side which he thinks ought to recover, and really results in denying the parties a right to a trial by jury.

I am not much alarmed about the destroying of the "traditional functions of all United States judges in the conduct of jury trials" nor of impairing "the prestige they now occupy," nor am I much alarmed about this bill destroying "the power and independence of the Federal judiciary" or "invading its constitutional prerogative."

There are so many good reasons which appear to everyone who has studied the history of jury trials how the judge should be required to charge the jury in writing, and how his charge should be given before the argument of counsel, and how he should not be permitted to express his opinion as to the credibility of witnesses or the weight of the evidence that it is not much use to take up any time in arguing these.

The Federal Courts have been unwilling to break away from the traditional functions of the courts some two or three centuries ago.

If you could get the unbiased opinion of lawyers who have engaged in the trial of jury cases in the Federal Courts you would find that the vast majority of them are in favor of the Caraway bill, and I trust it will pass.

I am inclined to think that the striking out of the bill of the words "or value" is desirable because of the fact that it is proper to tell the jury as to the relative merits of positive and negative testimony, and as to the value in their consideration of particular kinds of testimony.

WILLIAM L. CUNNINGHAM.

The Criminal Law and the Ten Commandments

Denver, Col., March 4.—To the Editor: Controversy between "Fundamentalists" and "Modernists" is by no means confined to the Church. It is typical of the times and even the Bar is, in a different sense, affected by the same psychology.

There are those among us who still look to the fundamental law for fundamental conceptions of our republican form of government and these are the Legal Fundamentalists. Opposed to them are the Legal Modernists who expect the constitution to conform itself to every popular whim of reform, which at the moment represents the apparent opinion of the majority. And these Modernists have already wrought such a complete change in American polity that state sovereignty is rapidly becoming a mere memory. The result is a top-heavy bureaucracy at Washington, to a great extent out of sympathy and touch with the wishes and necessities of remote states, which are unable to correctly interpret its complex, multifarious and paternalistic rules and regulations.

The extreme difficulty and expense of attempting to enforce federal laws, enacted under this new theory, is typical of the effect of the Modernist transformation. We are confronted by the spectacle of wide-spread disrespect for the Law's authority and it suggests to the mind of Legal Fundamental-

ist the desirability of critically examining these Modernist laws in the light of first principles and applying to them such fundamental criteria as can be relied upon to test their worth.

Thus, getting back to first principles, we find at the outset that the source of all law is the Law of Nature, which controls us in spite of ourselves, and lawyers will freely admit this premise without demonstration.

Liberty is a Law of Nature and perhaps the nearest approach to an exact definition of human liberty is that of Tom Paine, contained in the French constitution of 1795—"all acts of violation not injurious to others." Beyond that, the law should not and cannot successfully go, and any law which is openly violated by large numbers of people will be found to infringe upon that natural right of man to freedom from unreasonable restraint. Up to the point of injury to others, the majority of free-born men will always maintain that government has no business penalizing them for their acts.

Again, the Ten Commandments, propounded by Moses and confirmed by the Saviour, compress into a few words all natural law and the natural limitations of interference with liberty.

These Ten Commandments have been the moral guide of civilized men through all the ages since; they imply every restraint which can be successfully put upon man's liberty; and afford an infallible criterion for the writing of criminal laws into the statute books. Beyond their scope, no criminal law has ever received or ever will receive popular support, whether it be dignified by incorporating it into the federal constitution or not.

The fact is that we cannot exceed this divine authority with impunity and if the law, generally, is to command respect and obedience in the future, the Fundamentalist's view is that all such laws as clearly go beyond the decalogue must first be weeded out of our constitutions and statutes—root and branch.

When this major operation has been performed, our federal courts will cease to function chiefly as police courts and resume their former dignity; our crowded dockets will clear up of their own accord; and our police officers will find time to discover and apprehend the real criminals who are slowly but surely undermining the very fabric of American society.

JOSEPH C. SAMPSON.

Boston, Mass., April 16.—To the Editor: In a recent Boston paper attention was called to a suggestion of the Director of the Bureau of Research in Government of the University of Minnesota that the Supreme Court of the United States "appears to many as a purely destructive and critical institution" and "that a way be found to make the court a co-operative body, assisting in the drafting of constitutional amendments and the preparation of laws." The Massachusetts Constitution contains a provision under which each branch of the legislature, as well as the Governor and Council, may require the opinions of the justices of the Supreme Judicial Court "upon important questions of law and upon solemn occasions." Some other states, I think, have similar provisions.

Such proposals were considered at the time the constitution was framed in 1787, but all plans for loading the court with advisory functions, were discarded, and fortunately so, in view of the increasing burdens on the court.

The history of this matter is given by the late James B. Thayer as follows:

> In the Federal Convention of 1787, it was proposed that "each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions," (5 Ell. Deb. 445). But nothing came of it. (Thayer's "Legal Essays," Note, p. 43.)
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> It is an interesting fact that Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined to respond. The President and Cabinet came to the conclusion to ask this opinion from the judges on July 12, 1793. Those who were at hand appear to have suggested delay until they could communicate with their absent associates. A letter of July 23, from the President to Chief Justice Jay and his brethren, is preserved, in which he assents to this delay, but expresses the pleasure that he shall have in receiving the opinion at a convenient time. (Sparks' Washington, X., 359.) The date was but a little later, of which Marshall speaks when he says (Life of Washington, Ed. Phil. 1807, V., 441): "About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." It was, perhaps, fortunate for the judges and their successors that the questions then proposed came in so formidable a shape as they did. There were twenty-nine of them, and they fill three large octavo pages in the Appendix to the tenth volume of Sparks' Washington. Had they been very brief and easily answered the court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system. As it is, we may now read in 2 Story, Const. s. 1571, that while the President may require the written opinion of his Cabinet, "he does not possess a like authority in regard to the judicial department." (Thayer's "Legal Essays," pp. 53, 54.) (For the history of this advisory function in Massachusetts, see Mass. Law Quarterly, May, 1917, pp. 542-552.)

The proposal that the Supreme Court of the United States should be required to render such advisory opinions involves different considerations from those which apply to similar functions of a state court such as we have in Massachusetts. The fact that the president and his cabinet wanted 29 of such questions answered by the court in 1793 suggests what would happen if both branches of congress, as well as the president, were given the right to-day to ask the court questions. The court would be overwhelmed with a constant stream of questions on every conceivable subject. Instead of placing the court in a clearer position before the people and inspiring more respect for that tribunal it would place it apparently in the political field.

The advisory function is understood in the smaller area of a state like Massachusetts but, in the enormous area of the United States, with its varying views and prejudices in regard to the courts, it would be sure to cause more misunderstanding than exists to-day. The strictly judicial function of the court in deciding litigated cases would be seriously interfered with. The present strong legislative tendency to "pass the buck" to the court and then abuse it for its decisions would be enormously increased. While the court is doubtless misunderstood by many people as it always has been, it is a

mistake to suggest that it is "a purely destructive and critical institution."

While people do not fully realize it, it was the constructive opinions of Chief Justice Marshall in expounding the constitution in litigated cases, argued under the spur of controversy by able counsel, which resulted in the growth of the national spirit that carried us through the Civil War and since has protected the rights of individuals and the balanced structure of state and national governments from the recurrent attempts at congressional supremacy. The constructive influence of these judicial opinions has been of the greatest assistance to congress in indicating legally possible lines of congressional action. This influence could hardly have been possible if the court had not occupied a clearly independent and impartial position removed from the political controversies during the preparatory stages of legislation. It is impossible to avoid some uncertainties in our constitutional law under the complex conditions of our modern life. The court will be better understood and its constructive influence stronger if its present position of independence, separate from the legislative department, is maintained.

The advisory system, while it is valuable in Massachusetts and might be so in the restricted area of other states which do not have it, would, in my opinion, be a serious mistake for the nation. The fact that the new Court of International Justice performs this advisory function is beside the point. International law, in its present development, is of such a character that advisory opinions are better adapted to its development than judicial decisions, but that is not true of the Supreme Court of the United States.

F. W. GRINNELL.

No Such Thing as Minority Judicial Power

Chicago, June 7.—To the Editor: The letter of Judge Marx of Cincinnati on an alleged revolutionary instance of minority judicial rule is an excellent illustration of the poor logic of the uncompromising upholders of what progressive laymen and fair minded lawyers rightly (though not technically) call the judicial veto.

The new Ohio constitution limits this judicial veto in a most moderate and reasonable manner. Statutes cannot be annulled by a bare majority of the State Supreme court; a concurrence of six out of seven members is required, save in cases in which the court of appeals holds a law unconstitutional. Judge Marx does not attack this limitation, realizing, no doubt, the utter futility of such proceedings. What he violently objects to is that "the minority" of the Supreme court—"made a positive and affirmative statement of the law in the syllabus of the case."

Here is a distinction without a difference. A mere form of statement is pointed to with alarm, although it is perfectly clear that the principle involved was established not by a minority, but by the sovereign power of the state!

Under the Ohio constitution there is no such thing as minority judicial power. The "power" is in the people and in the legislature. The effect of the limitation of the veto is this: Five judges are deprived of the power to annul a statute passed by the legislature, signed or approved by the executive, and upheld by the appellate court and two members of the Supreme court. Minority rule is prevented rather than imposed by this limitation.

It is perfectly safe to say that other states, as well as congress, will follow the example of Ohio in thus rationally limiting the judicial veto upon legislation. Former Justice Clark in his paper in this Journal some months ago suggested a wise application of the rule of doubt in constitutional cases, and it is interesting to note that his fair and logical suggestion has been received in silence. The five-to-four and four-to-three decisions, as he pointed out, not for the first time, make a mockery of the rule of doubt supposedly followed by all courts.

Either the courts will adopt a self-denying rule or else constitutional amendments will be adopted limiting their veto and giving proper effect to the rule of doubt. The American people will not long tolerate the paradox and incongruity of five-to-four decisions—decisions which mean nullification of statutes passed in response to need, and to public sentiment, by the vote of one judge—usually a standpatter who places himself in the path of progress.

V. S. Y.

The Disposition to Enforce the Law

Wichita Falls, Tex., April 22.—To the Editor: The Journal of the American Bar Association is interesting reading for all members, and alone worth the cost of membership.

But at times as possibly in all periodicals, conclusions are not supported by the evidence and facts discussed. For example, references made to records of prosecutions on basis of percentage of convictions to total trials, is fallacious.

I have lived in several States. I know nominally at least conditions in a number of states. And I say with all positive assurance, that the variation in disposition to attempt to enforce law in various cities is material in determining any such records.

Granting that such is the case, any 100% or near 100% record boasted by some alleged super-prosecutors means, and only means, that no man is indicted or complained against in that community unless his guilt is so apparent that prosecutors and law enforcement officers are compelled by force of public opinion to take action. That force is nil or nominal as to less well known crimes or guilt. This factor has more to do with some alleged records, than differences in ability of prosecutors, or their individual views and attitudes toward crime.

F. G. SWANSON.

A Cryptic Reply

"A few weeks ago I was discussing with a lady many of the changes that have occurred in the last fifteen or eighteen years, of which I told her I heartily disapproved. We got to discussing the matter of the flapper and the women's dresses and things of that sort, and during the course of these remarks about the customs she called my attention to a picture in one of the fashion magazines and said, 'Now, what could be more becoming to a woman than something like that?' I said, 'Nothing'."—From address before Texas Bar Association, 1923.

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The dues are $6.00 per year. There is no initiation fee. Members receive, as perquisites of membership, the monthly "American Bar Association Journal" and the printed annual reports of the proceedings of the Association, constituting a valuable year book of the profession in this country, in which their names are listed as members, both in the alphabetical list and in the list of members arranged by cities and towns in states.

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West Virginia.....Harvey F. Smith, Clarksburg
Wisconsin .....Arthur A. McLeod, Madison
Wyoming .....William C. Kinkead, Cheyenne

Applications may also be obtained from the officers of the Association and from the office of the American Bar Association Journal.

Bench and Bar Back Grotius Fund

"Contributions coming in daily for the Grotius Memorial Fund from all parts of the country, including the far West and the South, as well as the East and the Middle West, show that members of the bench and bar of the United States are interested in the movement to honor the father of international law. Officers of the Netherland-America Foundation are gratified with the offer of bar associations like that of Tennessee to name a local representative to receive contributions and assume responsibility for collecting the state's quota for the Fund. Other encouraging signs are comments regarding the Grotius Memorial Fund, which have appeared in the metropolitan press of the country and leading legal journals such as the American Journal of International Law and the American Bar Association Journal.

"The Fund has been sponsored and subscribed to by jurists associated with international law like Chief Justice Taft, Elihu Root and John Bassett Moore, and has been endorsed by legal bodies such as the Bar Association of the City of New York. Nationally known leaders will speak in behalf of the Grotius Fund, at the next annual meetings of bar associations in various states. Honorable Newton D. Baker, former Secretary of War, will address the Bar Association of Ohio in August. Honorable John W. Davis, former Ambassador to Great Britain, will present the subject to the American Bar Association at its meeting in Philadelphia in July."—*News letter of the Netherlands-America Foundation.*

National Oratorical Contest on Constitution

The final meeting of the national oratorical contest on the Constitution was held at Washington, in Memorial Continental Hall, on June 6. President Coolidge presided, and was presented to the audience by Temporary Chairman, Hon. R. E. L. Saner, President of the American Bar Association. The judges of the contest were Chief Justice Taft and Justices Van Deventer, Sanford, Sutherland and Butler. Mr. Don Tyler of Los Angeles won first place in the contest, and a prize of $3,500. Miss Ruth Newburn of Washington won the second prize of $1,000 and Mr. John M. Dallam, III, of Philadelphia, the third prize of $500.